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THE NATIONAL GOVERNMENT OF THE UNITED STATES

BY

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PREFACE

This book is a study of the national government of the United States. Many excellent texts have been issued upon state, city, and local government, and the presentation of these subjects in special courses gives the opportunity to devote an entire volume to the national government alone. The development of our national institutions has been discussed from many points of view: political, historical, and economic.

In discussing this theme I have endeavored to show the historical origins and the development of our national political institutions and to present an adequate picture of the actual workings of the government. But I have also attempted never to lose sight of the fact that the Constitution is the supreme law of the land, and its interpretation by the Supreme Court is, until altered, authoritative. The important fact is emphasized that in all phases of our national life the government is a government of law. To make this clear I have quoted freely from the opinions of the Supreme Court. There is a double advantage in so doing: the decisions of the court are authoritative, and the exact words show the process of arriving at conclusions or, in the case of minority opinions, at the reasons for dissent. This feature of the book gives it a twofold character, that of a textbook in which institutions are described and analyzed and that of a source book in which appear the actual words used by the court in expounding or limiting the powers of the government. To this end I have selected both historical cases and present problems, but rather by way of illustrating permanent principles than for the sake of discussing the merits of particular problems. It has seemed more important to explain a principle than to win a convert.

To my students of Smith College I owe a debt of gratitude for making it possible for me to develop the method I have used. In particular I wish to express my obligation to Professor G. H. Haynes, Professor E. D. Fite, and Professor E. J. Woodhouse, who have read portions of the manuscript and proof. Acknowledgment is also due to Honorable F. H. Gillett, Speaker of the House of Representatives, who most kindly read and criticized the chapters upon "Congress at Work." But for all statements of opinion and fact I am alone responsible.

DECEMBER 1, 1919 EVERETT KIMBALL

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THE NATIONAL GOVERNMENT OF THE UNITED STATES

CHAPTER I

CONSTITUTIONAL BACKGROUND

The Constitution of the United States not a revision of Articles of Confederation

The Constitution of the United States was the work of the convention of 1787. This convention, called for "the sole purpose of revising the Articles of the Confederation," assembled at Philadelphia, and after nearly five months of painstaking labor produced, not a revision of the Articles of Confederation but an entirely new frame of government.

Few changes from original form

Although eighteen amendments have been added to this instrument, its form has been vitally altered but few times. The first ten of these amendments, expressing the wish of a large proportion of the members of the convention and the overwhelming desire of the people, may be considered a portion of the original document. The Twelfth Amendment was adopted to remedy the dangerous defect in the process of the election of the president revealed by the elections of 1800 and, while altering the legal process, did but sanction the methods made necessary by the growth of parties. The Thirteenth, Fourteenth, and Fifteenth Amendments were the result of the long struggle over slavery culminating in the Civil War and the consequent readjustments. These amendments, in addition to settling these controversies, vitally alter and change the balance between the federal and state governments as planned by the convention. The Eleventh Amendment, adopted in 1798, and the Sixteenth (1913) were caused by decisions of the Supreme Court which ran counter to popular approval and settled points which were either unconsidered or which were doubtful in the minds of the framers. The Seventeenth (1913) represents the rising strength of democracy, impatient of the checks and balances which the men of 1787 thought necessary. The Eighteenth (1919) is an attempt to regulate by national authority matters originally left to the states.

Background of framers

The form of the Constitution is thus emphatically the work of the convention of 1787. But nothing could be more false than to assume that the convention created de novo our present system of government. Among the fifty-five delegates who composed that body seven had served as governors of their respective states, twenty-eight had been delegates to the Continental Congress, many had had actual experience in the legislative assemblies of the colonies or states, and all were familiar with the problems of government which faced the nation. It was this practical experience gained in the successful working of the colonial and state constitutions and the bitter experience of the unsuccessful operations of the Confederation, rather than any sudden inspiration, which produced the Constitution.

Modifications by

(1) legislation

(2) judicial interpretation

(3) party practice

(4) political habit

Furthermore, although the framework as designed by the convention has been but seldom altered, the actual working of the Constitution has been and is being greatly changed. Around the original document there is a mass of constantly changing legislation, adopted to give to the provisions of the instrument that effect desired at the particular moment. Hardly a clause or phrase of the instrument has escaped judicial review, which has almost invariably construed or interpreted them to meet such needs as have been demanded by the people. The whole far-reaching party system, little considered and less understood by the framers, has produced new processes of government and given new meanings to the system established by the framers. Finally, political habit and custom have erected limits and extended functions in a manner unthought of by the originators.

Thus, in order to understand the Constitution and the system of government it establishes it is necessary to appreciate the experience at the command of the framers, to examine the legislation of Congress, to study most carefully the judicial interpretation by which the Supreme Court has extended or limited the powers of Congress and the functions and powers of the government. Above all, it is necessary to understand the workings of that vast extra-legal institution, the political party system, which exists outside of the formal document but which alone makes possible the operations of the government. And finally must be considered the traditions and customs which so often condition the working of the party system and the process of legislation and even the interpretation given by the courts. From this point of view the study of the Constitution is not merely the study of a formal document drawn up in the last years of the eighteenth century but the interpretation of the political life and practices of ever-changing institutions.

COLONIAL TRADITIONS AND EXPERIENCE

Similarity of political experience and institutions

Although different motives were operative in the founding of the thirteen colonies, and although different systems of government were tried at various times, there was a general tendency to develop institutions which were practically alike. The minor local divergences from these institutions, although interesting, are not of as much importance as the general agreement found in the essentials. In all but Georgia the fundamentals of the colonial institutions had been in operation for nearly a century, while Virginia had had over one hundred and fifty years of political experience under substantially the same system of government. This common political experience gained from generations of life under similar institutions was of the greatest importance to the makers of the Constitution.

Written constitutions and colonial legislations

From their foundation to the Revolution the colonies had been accustomed to written constitutions. These were expressed in a grant, a charter, or in royal instructions, but in whatever form found they had the nature of a fundamental law. They were unchangeable by the ordinary process of legislation and dependent solely upon the legal sovereign of England, which, after 1689, was Parliament.[1] Acts of the colonial assemblies contrary to these fundamental charters, or constitutions, were void in theory, as being *ultra vires*, and in practice were generally disallowed by the Crown. In those colonies where the charter provided for a periodical submission of colonial acts the review of legislations was automatic. In other colonies, since the right of appeals to the king in council was insisted upon, colonial legislation might possibly have to pass the scrutiny of the law officers of the Crown. Thus long experience had accustomed the colonists to written constitutions, beyond the competency of their legislatures to change, and also to a semijudicial review of their legislation with the possibility of the annulment of their acts.

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[1] *Campbell* v. *Hall*, J. B. Thayer, Cases in Constitutional Law, Vol. I, p. 40.

Executive veto

In the majority of the colonies, moreover, all colonial legislation was subject to the executive veto of the governor. In the royal provinces, which numbered eight at the time of the Revolution, the laws to be valid must receive the approval of the Crown. In the proprietary provinces[1] the assent of the proprietor was in theory required, and, in the case of Delaware and Pennsylvania, the laws were also submitted to the Crown. In Rhode Island and Connecticut alone legislation was unhampered by executive control.

Representative assemblies

Almost from their foundation the majority of the colonies had been accustomed to representative assemblies. Whatever may have been the original differences in their composition and powers, by the era of the Revolution they approximated a common type. In all the colonies, except Pennsylvania, the legislature consisted of two houses, a representative assembly more or less popularly chosen and a council.

The council

In Massachusetts, Rhode Island, and Connecticut the council was elected. Thus it closely reflected the sentiments of the colonists, which in Massachusetts were often in opposition to the appointed royal governor. In the other colonies the council was appointed either by the Crown or by the proprietor on the nomination of the governor, who also had the power of removal. Thus the council was usually found on the side of the governor in a dispute with the representatives. The council, except in Pennsylvania, possessed the usual functions of a second chamber in legislation and discussed, amended, and voted the measures sent to it from the representatives. Moreover, in all the colonies the council advised the governor in matters of administration, in many cases shared with him the responsibility of appointments, and with him formed the highest court of appeal in the colony. It thus performed the dual function of the upper house of a legislative assembly and the advisory council of the executive.

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[1] Maryland, Delaware, Pennsylvania.

The suffrage

The representative assembly in every colony was chosen by popular vote, and everywhere the qualifications for suffrage were vexatious and restrictive. In every colony a property qualification was required. In Massachusetts, by the charter of 1691, which continued until the Revolution, the franchise was restricted to forty-shilling freeholders or possessors of other property to the value of forty pounds. New York had a somewhat similar qualification, but also granted the suffrage to all members of the municipal corporations of Albany and New York. Pennsylvania granted the franchise to all who possessed fifty acres of land or fifty pounds of lawful money. Virginia required fifty acres without a house, or twenty-five acres with a house at least twelve feet square, or in towns a lot or part of a lot with a house twelve feet square thereon. The effect of these restrictions upon the voting population was striking. It is difficult to obtain exact figures, but Dr. A. E. McKinley brings forward the following significant facts and conclusions:

> The franchise was more widely exercised, if not more widely conferred, in Virginia than in the more northern colonies. . . . [In New England] the potential voters vary from one sixth to one fiftieth of the population, and the actual number of voters shows almost an equal variation; Massachusetts and Connecticut showing at times only two per cent of actual voters among the population, where perhaps sixteen per cent were qualified electors, and New York City and Virginia showing the far larger proportion of eight per cent of the population as actual voters.[1]

Apportionment of representatives

Contrary to English practice the colonial idea of apportionment was to grant representatives by general law and roughly according to population. In general, towns, villages, or parishes were entitled to one or more representatives either singly or in combination, and there was some attempt made to add to the number from larger communities. There were obvious exceptions to this rule, especially in South Carolina and Pennsylvania. In South Carolina the representatives were apportioned according to the parishes, which were of most unequal population, while in Pennsylvania the Quaker counties of the east, although in the minority, had twice the number of representatives apportioned to the western counties. These and other inequalities in apportionment were increasing from the natural growth of the country and because of the instructions of the British government, which sought to limit the incorporation of towns with the right of representation. The colonists, furthermore, had departed from the English practice in another way, in that, generally, only residents of the districts were chosen as representatives. In fact, it may be said that if the colonists had been allowed to develop their own ideas without English restrictions, they would have probably developed a system of apportionment and representation still further differing from the English practice and more nearly approaching the present system.

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[1] A E. McKinley, The Suffrage Franchise in the Thirteen English Colonies, *University of Pennsylvania Publications*, p. 487.

Claims and powers of assemblies

The colonial assemblies thus chosen claimed full power to regulate their domestic affairs. In legislation the assent of the Crown was necessary, but by means of delays and the passage of temporary acts the assemblies frequently succeeded in accomplishing their ends in spite of royal disapproval. In finance the assemblies claimed exclusive power and maintained their right to lay all taxes levied within the colonies and to make appropriations. This control of taxation and appropriation gave the authorities in England the greatest trouble. Again and again the assemblies successfully resisted the demands of the royal governors, even though they were supported by instructions from the Crown. Not only did the assemblies maintain this right but they utilized it to obtain other concessions. Because of the right to make appropriations they claimed the right to pass upon the necessity of the object for which the appropriations were desired and in some instances vested the expenditure of the money and the auditing of the accounts in officers of their own appointment. By threatening to withhold or by actually refusing to make appropriations, unless some grievance was redressed or privilege guaranteed, the assemblies won for themselves constitutional and legal rights which were invaluable to the colonists. In short, the assemblies regarded themselves as possessed of the same rights as the House of Commons, and, quoting precedents from the struggle between the Commons and the Crown, they sought to place themselves in a similar position. It was this legislative experience in the assemblies which taught the colonists the lessons of self-government and gave their leaders the necessary training in practical politics.

The provincial governor

In the eight royal provinces the provincial governor was appointed by the Crown and occupied the dual position of the representative of the British government and the highest colonial executive. In this last position his powers are significant in showing the result of colonial experience. The royal governor was charged with the supervision and the enforcement of the laws and the maintenance of peace and order. He was commander in chief of the colonial militia and commissioned the higher military officers. He had, with his council, the power to appoint and remove the civil officers and, except in Massachusetts, could remove the members of his council. As chancellor he had important judicial duties in hearing appeals from the lower courts, and he also had the power to grant reprieves and pardons. In addition to his executive powers he had wide power in legislation. Except in Massachusetts he nominated the council, and in all the royal provinces he had the right to summon, prorogue, and dissolve the assembly. He attempted to influence legislation by messages and addresses to the assembly and by debate in the council, over which he presided. Through his veto power he could check any bill after it had passed both the house of representatives and the council.

Actual powers and influence of the governor

These powers, however, were both extended and limited by the political influence of the governor, by his instructions from England, and by the political development of the province. Through his power of appointing the returning officers for elections to the assembly the governor sometimes succeeded in packing the house of representatives with his adherents, but more often he utilized his social position for whatever political influence he might possess. His influence and popularity, however, were seriously diminished by his instructions from the English government. His powers were under close scrutiny and supervision, and he was frequently forced to urge upon the province a policy which, however wise it might be for the interests of the empire, aroused local dissatisfaction and opposition. Finally, the assemblies, through the power to make or withhold appropriations, developed such political skill that they were able to check the designs and many times to gain the compliance of the stiffest provincial governors.

The governor in proprietary

In the proprietary provinces the proprietor, when in the colony, assumed most of the functions of the governor; in his absence they were performed by a deputy of his appointment. These prerogatives varied greatly from Maryland, where the power of the governor was most far-reaching, to Pennsylvania, where the assembly sat as a single chamber without the council and was almost free from executive control. By the charters of Connecticut and Rhode Island the governors were elected annually by the respective assemblies and were not distinct officials, but acted only in conjunction with the council, which was likewise chosen by the assembly. In neither of these colonies did the governor have the power of veto over the acts of assembly.

The governor in Connecticut and Rhode Island

Influence on state constitutions

There were other minor variations in the powers of the governor in the different colonies. But in general the theoretical and, to a large extent, the actual powers of the royal governors were great enough to cause the framers of the first state constitutions to limit them decidedly. Thus the new executive approached the type of the Connecticut governor rather than that of the provincial governor.

The colonial judicial system

The courts of the different colonies had many features in common and all enforced English common law, the colonial statutes, and the acts of Parliament which applied to the colonies. In every colony there was a threefold organization — justices of the peace for petty cases, county courts for all but capital cases, and a court of appeal. From the colonial court of appeal appeals could be carried to the king in council. Early in colonial history this claim had been resisted. Massachusetts, for example, passed acts to forbid such appeals, and throughout the colonial period it could be used only in important cases. The English government, however, was insistent, and appeals were carried to England not only from the royal provinces but from Connecticut and Rhode Island, the most independent of the colonies. The procedure was complicated, costly, and tedious,

Appeals to the Crown

but in time the right of appeal came to be regarded by the colonists as a safeguard against local injustice. From a constitutional point of view it served to keep colonial legislation within the limits set by the charters and to accustom the assemblies to an occasional judicial review of their acts as well as to give an opportunity for correcting faulty judicial decisions.

The political and social life of the colonies not democratic

Neither the political nor the social life of the colonists was democratic. In every colony except Rhode Island and Connecticut there was an ever-increasing number of appointed officials — governors, members of the councils, judges, and officials who owed their positions neither to the electorate nor to the representatives in the assemblies. They constituted the governing class, which monopolized the offices and rewards both social and material and occupied the highest rank both in society and in government.

In the Southern colonies and in New York and, to a lesser degree, in Pennsylvania certain families and their connections held vast estates and constituted a landed aristocracy above and beyond the possible ambitions of the slaves, indented servants, and tenants who cultivated the land. The rich merchants of Philadelphia, New York, Charleston, and Boston represented the moneyed interests and usually were allied in purpose and feeling with the landed class. In New England the clergy and the colleges furnished an element which ranked in influence and prerogatives above the majority of the people. Even the representatives to the assemblies stood for property, since the qualification for the franchise was so high that only the well to do could vote.

Resistance to England has often been mistaken for a desire for equality. But there is little evidence to show that until the era of the Revolution the majority of the well-to-do colonists were greatly dissatisfied with their institutions. The leaders still held a view of democracy which was not unlike that of John Winthrop who wrote of "the unwarrantableness . . . of referring matters of counsel or judicature to the body of the people, *quia* the best part is always the least, and of that best part the wiser part is always the lesser."[1]

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[1] Life and Letters of John Winthrop, Vol II, p. 237; quoted by Edward Channing, History of the United States, Vol. I, p. 348.

REVOLUTIONARY EXPERIMENTS

The revolution presented two problems and produced two governments

The separation from Great Britain involved a double task — military and constitutional. By force of arms it was necessary to put an end to the authority of England. To maintain the revolutionary army it was necessary to establish some system of government capable of supplying money and directing the movements of the forces. It was equally necessary that this government should possess the confidence of the people and be able to preserve peace and order within the states. This twofold task was performed by two sets of governments — the Continental Congress, which represented the union of the states, directed the military operations, and conducted the foreign policy; and the state governments, which grudgingly responded to the requisitions of Congress for men and money, but which preserved order and furnished the sole legal authority within the United States until the adoption of the Articles of the Confederation in 1781. Thus, although the Continental Congress conducted the greater part of the war, accepted great responsibilities, and was tacitly accepted by the different states, it was a revolutionary body without legal authority. The states, rather than Congress, first established a legal, in contradistinction to a revolutionary, system of government.

BEGINNINGS OF STATE GOVERNMENT

The preliminary work of spreading revolutionary doctrines and molding public opinion was accomplished by unofficial means. Individuals or groups of men under the influence of some more advanced agitators formed unofficial groups where opposition to Great Britain was discussed. The next step was to get some quasi-official authorization for their action, and this was sought either from the town meeting or from the colonial assembly. Thus, in Boston, the Town Meeting in 1772 resolved, on the motion of Samuel Adams, to appoint a committee of twenty-one "to state the Rights of the Colonists . . . to communicate and publish the same to the several Towns . . . as the sense of this Town. . . . Also requesting from each Town a free communication of their sentiments on this subject." Throughout the

Province there was a hearty response, and in almost every town either a self-constituted group or a committee appointed by the town meeting began to correspond with similar committees in other towns and in particular with the committee in Boston. In Virginia the House of Burgesses, by a resolution, March 12, 1773, established a committee of eleven "to keep up and maintain a correspondence and communication with our sister colonies, . . ." thus pointing the way to extra-legal methods of intercolonial communication and union. Both the Massachusetts and Virginia plans were adopted by the other colonies, and before hostilities began or the authority of England was seriously questioned there existed a framework of revolutionary government. In some colonies this organization was of an advanced type. New Jersey, for example, had town, county, and colonial committees, directly chosen in the first instance and by delegation from the lower to the higher committees.

The influence of the committees of correspondence

It should be remembered, however, that this apparent wide representation was representation of one party only. "Honest men" — in other words, revolutionists — were alone chosen for these committees. Loyalists and those whose opposition to Great Britain was lukewarm had little influence and received scant consideration. Nevertheless, faulty as these committees were in origin and composition, they were extremely powerful and by means of influence, intimidation, and sometimes violence enforced their opinions. Moreover, as the authority of the royal governments weakened and finally disappeared, these committees and the conventions they summoned became the only form of organized government within the provinces. Obedience and submission to their acts gave a semilegal sanction to their revolutionary power until the state constitutions could be framed and adopted. In another way these committees contributed to the ease with which the colonists established the new governments. Either by the choice of delegates to the provincial congresses or by means of letters, these bodies conveyed to the central revolutionary body in each colony the sentiments and ideas of the people far more quickly than an election would have done, had such been possible in the presence of the British forces. Thus, of the fourteen constitutions which were adopted between 1776 and 1783 only two were formally submitted to the people for ratification, while four were informally published before final action was taken upon them. Eight of the new constitutions, however, were adopted by these purely revolutionary bodies without consultation and without giving the people an opportunity to express criticism or approval. Irregular as this method seems, it was not seriously questioned at the time, but recognized as the most effective method to reestablish some form of government.

FORMATION OF STATE CONSTITUTIONS

State constitutions framed on the advice of Congress

The alteration of the Massachusetts charter brought about the first step in the legal development of the state constitutions. The new royally appointed councilors were forced to resign, but the towns elected their representatives to the assembly, while committees of safety and county conventions urged that a provincial congress should be called. General Gage, the last provincial governor, attempted to prevent the meeting of the assembly he had summoned, but the representatives gathered at Salem and voted that they and such others as might be elected should become a provincial congress. Meeting at Concord, this body took up the double task of resistance and government and applied to the Continental Congress for advice. The answer of Congress concerning the form of government to be adopted was in the resolution of June 9, 1775. It advised the Massachusetts convention to write to the towns having representation, asking them to choose representatives as under the old charter, and that the representatives so chosen should elect a council which should, together with the representatives, form an assembly and exercise the power of government.[1] This advice was followed, and Massachusetts continued until 1780 to operate under her old system of government minus the royal governor. A year later Congress took a bolder tone, and in response to the repeated requests from the states recommended that "where no government sufficient to the exigencies of their affairs has been hitherto established, [the states] adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[1]

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[1] *Journals of the Continental Congress*, Vol. II, pp. 83-84

Methods of adoption of first constitutions

Following this advice all the colonies, except Connecticut and Rhode Island, whose charters needed scarcely any alteration, framed constitutions in the representative assemblies, which had displaced the colonial legislatures. In the case of Virginia and South Carolina these constitutions were adopted, like any other legislative act, in the assemblies chosen for general purposes. Most of the other constitutions, however, were accepted by delegates chosen with the question of framing a government clearly in mind. In Maryland, Pennsylvania, North Carolina, and South Carolina, in 1778, the work of the assemblies was informally submitted to the people, while in Massachusetts in 1779 and in New Hampshire in 1783 special constitutional conventions were called to frame the documents, and the results were submitted to the people for ratification, a method which has been followed with varying fidelity ever since.

The constitutions produced by these bodies reflect both the colonial experience and the revolutionary theories. In seven of the documents a Bill of Rights precedes the actual frame of government, and in many of the others sections and clauses are inserted which in a less formal degree indicate the political philosophy of the framers.

Similarity o constitutional framework

In general the frame of the government continued the institutions with which the people were familiar, for all but Pennsylvania provided for a single executive and a bicameral legislature and a system of courts.[2] In all cases the separation of these departments was decreed in theory if not in actual terms.

The governo

Colonial experience had taught the danger of a too powerful executive, and in every instance the state governor had far less power than his colonial predecessor. In the first place the governor was elected by the voters in New England and New York, and by the legislatures in the other colonies. New York and Delaware provided for a three-year term, South Carolina for a two-year term; elsewhere the governors were chosen annually. Moreover, in six of the states there were restrictions upon his reelection varying from a four-year interval in South Carolina to three years in seven in Virginia. Everywhere the governor had lost his independent power of appointment and shared this prerogative either with a council or with the assembly. In Massachusetts the governor retained a qualified veto, in New York he shared it with a council of revision; elsewhere the newly elected state executive had no veto upon the acts of the legislature. The powers thus taken from the governor were given to the legislature, but during the war unofficial committees frequently exercised extra-constitutional powers, or the legislature conferred upon the executive greater powers than were granted him by the constitution. For example, the convention which adopted the constitution of Virginia passed the significant resolution that "superadded to the powers given to the governor and privy council by the form of government passed by this convention, the governor, with the advice of the privy council, shall have and possess all the powers and authority given to the committee of safety by an ordinance appointing a committee of safety passed at Richmond, July, 1775, or by any resolution of the convention."[1] Thus the inconvenience of a weak executive was not felt, and the colonial prejudice against a strong one was satisfied.

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[1] *Journals of the Continental Congress*, Vol IV, p. 342

[2] The constitution of Pennsylvania of 1776 established an executive council elected by the voters to serve for three years instead of a governor. Moreover, her legislature alone of all the colonies consisted of a single house — a house of representatives. The constitutions of both Pennsylvania and Vermont provided for a council of censors to review the acts of the legislature, to report to the people, and to advise constitutional amendments Vermont in 1786 and Pennsylvania in 1790 adopted constitutions of the more familiar type.

The legislature

The legislature was magnified in every constitution. In all but South Carolina (1778) the representatives were chosen annually, but the qualifications remained high in form although they were disregarded in many instances. In almost every state there was higher qualification for a representative than for voter, and in Massachusetts, Maryland, and North Carolina a still higher qualification for a member of the upper house. It should be remembered that the revolutionary bodies which framed these constitutions were usually chosen by voters under the old colonial qualifications, which were not low, nor is there any evidence to

Property qualifications

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[1] W. F. Dodd, The Revision and Amendment of State Constitutions, p. 31.

show that the framers of these constitutions, however much they might embrace the doctrine of the natural rights of man, considered universal suffrage as one of them. Human rights were protected, but the franchise was restricted to the propertied class. The legislature in every instance had the power to pass laws, levy taxes, and appropriate money. In addition, in many states the right of initiating money bills was confined to the lower house, and in some instances the upper house was prohibited from amending these. In three instances the practice of Parliament was followed, and the representatives were given the right of impeachment with trial before the Senate. In Virginia and North Carolina, however, the trials were before the courts of law.

Political theories

The political theories found in these constitutions were in some ways more significant than the framework of government. Did the state legislatures consider themselves, like Parliament, sovereign bodies whose acts were beyond the power of question, and were they capable of amending the constitutions under which they assembled? Or were the constitutions — like the colonial charters — fundamental laws, beyond the competence of the legislature to alter, and intended to serve as limits to the legislative power of assemblies? These questions can best be answered from a study of the Bills of Rights found in the several constitutions, from the methods provided for amendment, and from the attitude of the judges.

Bills of Rights

Seven states prefixed Bills of Rights to their constitutions.[1] These repeat the familiar principles of the Great Charter and the English Bill of Rights concerning property, general warrants, trials, excessive bail, unusual punishments, freedom of the press, and the like. In every declaration, however, are found clauses repeating the theories of Locke, made familiar to the colonists by Otis, Henry, and Jefferson and embodied in the Declaration of Independence, invoking the doctrine of the natural rights of the people in contradistinction to the government established by them. Thus, Article IV of the Pennsylvania Declaration of Rights reads: "That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." These formal declarations were intended to express principles which were beyond the power of the legislature to touch, or rights reserved to the people. The sovereignty of the people is thus recognized, and the constitution becomes but a method of the exercise of that sovereignty, at once a grant of authority to the government and a limitation upon its power.

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[1] Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, Virginia.

Provisions for amendments

In the method of amendment or alteration there was no such clear unanimity of practice. Pennsylvania and Vermont provided for a council of censors to inquire whether the constitution had been observed, and who could, by a two-thirds vote, call conventions to revise or amend the constitutions; but this peculiar institution disappears in the second constitutions, which were soon adopted by the respective states. Georgia, Massachusetts, and New Hampshire provide for the calling of constitutional conventions by the legislatures, and in New Hampshire this is a requirement after seven years. The constitutions of Maryland, Delaware, and South Carolina were alterable by the legislatures by a slightly different process from that required for ordinary legislation, while there was no provision for amendment in the constitutions of the other states and consequently they could be altered by the ordinary process of legislation. Yet even in the case of these states amendments and new constitutions were framed not by the legislatures but by conventions.[1] It is therefore fair to believe that the absence of provisions for amendment indicate lack of consideration rather than a deliberate purpose to erect sovereign and constituent bodies.

Power of the courts to declare acts of the legislature unconstitutional

The power of the courts to annul laws passed by the legislature gives still more evidence of the binding force of the state constitutions. As has been shown, all the colonies were familiar with the principles of appeal to the king in council, which involved a judicial review of colonial legislation and the possibility of annulment. None of these first state constitutions gave the courts any power to declare an act of the legislature unconstitutional, although in Massachusetts the legislature might consult the judges. Nevertheless the judges early claimed the power of upholding the constitution in a case of conflict between an act of the legislature and a constitutional provision. The earliest cases, although not fully reported, arose in Virginia in 1778 and in New Jersey in 1779; in both instances the courts upheld the constitution in opposition to the legislature. Again, in 1782, in the case of *Commonwealth* v. *Caton et al.*, Chancellor Wythe in these rather grandiloquent words maintained the principle, "... if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, administering the public justice of the country, will meet the united powers at my seat in this tribunal; and pointing to the Constitution, will say to them here is the limit of your authority, and hither you shall go, but no further."[1] The most famous case, however, was *Trevett* v. *Weeden*, where in 1786 the court of Rhode Island refused to enforce a statute on the ground that it was "unconstitutional and void."[2] Thus, under the revolutionary constitutions and at the outset of their independent constitutional experience the state legislatures, although the executive veto had been abolished, were forced to submit to a judicial review of their acts and a judicial annulment. This ~~power of the~~ courts, more clearly than any constitutional provision, tended to keep alive the principles that the sovereignty rested with the people and that the constitutions defined and limited the powers of the legislature.

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[1] Maryland was an exception and amended her constitution by an act of the assembly, but the constitution of 1851 was framed by a convention.

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[1] J B Thayer, Cases in Constitutional Law, Vol I, p. 55.

[2] Ibid p 73.

CHAPTER II

THE EVOLUTION OF THE CONSTITUTION

THE CONTINENTAL CONGRESS

Although the various state constitutions became the first legal governments in America, the beginnings of a national government existed before the overthrow of royal authority. Indeed, as has been shown, it was the recommendations of the Continental Congress which directed the various states to form their own system of government independently of Great Britain. From this point of view it may be possible to speak of the state governments as creatures of the national government. Yet it may be questioned whether at that time either the states or the people at large would have admitted the existence of a central government possessing the characteristics of a sovereign body. An examination of the origin, purposes, and difficulties of Congress from 1774 to 1781 will do much to substantiate this point of view.

Colonial congresses

Prior to the revolutionary period the colonies had become familiar with intercolonial meetings at which the interests of all were discussed. These assemblies, or congresses as they were called, were extra-legal bodies summoned usually by the royal authorities. They possessed no legal powers and were conferences for discussion rather than legislative assemblies for action. At the beginning of the revolutionary period, in 1765, in response to the circular letter of the Massachusetts House of Representatives, a congress of nine colonies assembled in New York, known as the Stamp Act Congress. This was the first general assembly of the colonies called upon the sole initiative of the colonists themselves. Like the previous congresses it had no legal powers, but confined itself to drawing up a series of resolutions defining the rights of the colonists from their point of view. Although without legal power it pointed the way to

The Stamp Act Congress

combined resistance and was thus recognized by the English authorities as a precedent of "dangerous tendency," while its success led the colonists to repeat the experiment.

The First Continental Congress the creature of the colonies to obtain restoration of colonial rights

The First Continental Congress assembled in Philadelphia in September, 1774, upon the almost simultaneous call of Virginia and Massachusetts. At its first meeting it consisted of forty delegates from eleven colonies, variously chosen and variously instructed. This much they all had in common — they were chosen by different bodies within the colonies to represent the colonies as units, and they were instructed to strive by "legal measures" to obtain the repeal of the obnoxious acts of Parliament and a restoration of harmony between the colonies and the mother country: At the very outset the question of representation brought out very clearly the sharp distinction between the colonies individually and a united America. Patrick Henry might argue that "Government is dissolved.. . . . I am not a Virginian, but an American. . . . All America is thrown into one mass," but the facts were otherwise. Congress was a creature of the various colonies, seeking a restoration of what they considered their colonial rights, rather than the representative of the people of a single nation in a state of nature seeking to establish a new system of government. Whether lack of information to determine the proper basis of representation, or whether colonial jealousy influenced the delegates, it is certain that the First Continental Congress did not consider itself the assembly of a sovereign government, but an extra-legal assembly of delegates from definite political units striving as colonies of Great Britain to formulate and obtain certain rights.

Acts of the First Continental Congress not those of an independent body

Its acts, moreover, substantiate this point of view. In neither the Declaration of Rights nor the Association did Congress do more than state the facts and theories as it saw them, and recommend to the colonies certain lines of action. It is true that in the statement of colonial rights were included not only those which the colonies might properly claim, as subjects of the British system, but also certain political theories which, however widely held, had not the sanction of law. The recommendation to establish a boycott on British goods, while not absolutely illegal, was certainly a measure which pointed towards resistance by means other than argument. To this extent the First Continental Congress might be said to be a revolutionary body. It acted, however, not independently but through the colonies. It gave advice and counsel but lacked the sanction of legal authority and power.

The Second Continental Congress a revolutionary body

Different conditions confronted the Second Continental Congress. It was summoned in pursuance of a resolution of the Congress of 1774, and its members were as irregularly chosen as the members of the First Congress had been, but between the choice of delegates and the assembling of the Congress the appeal to arms had been made. It was useless to talk of resistance by legal means when General Gage was blockaded in Boston by the colonial militia. Moreover, whatever the relations of Congress to the colonies might be, Congress made the war in Massachusetts its own. The course of events rather than the development of theory made the Second Continental Congress the central body of the many revolutionary governments which sprang up throughout the colonies.

Congress represented states

The appeal of Massachusetts was answered by the choice of General Washington as commander in chief, and Congress assumed the power of a de facto government, organized for the purpose of defense and revolution. As a revolutionary body it finally adopted the Declaration of Independence, but by this act no new government was created; Congress was still an assembly of delegates from independent states. Its only power lay in the acquiescence of these states in its acts. It is true that it assumed the functions of a sovereign government, conducted the war on sea and land, borrowed and issued money, made treaties, and, in theory at least, possessed all the powers necessary to accomplish that for which it had been formed — the achievement of independence. Practically it did little more than to represent the states and was forced to modify its policy to suit their prejudices. Its weakness lay in its very origin. It was an irregular revolutionary government, existing without the formal acceptance of the people. Its strength lay in the necessities of the war, the enthusiasm of the revolutionists, and the skill of leaders.

THE ARTICLES OF CONFEDERATION

Origin and adoption of the Articles of Confederation

Almost a year before the Declaration of Independence was issued, Franklin had prepared a plan for the closer union of the colonies, and during the year 1775-1776 John Adams had urged the formation of a confederation of the states. On June 7, 1776, it was resolved to appoint a committee to prepare a form of confederation. A plan drawn up by John Dickinson was presented on July 12 and debated at intervals until November 15, 1777, when, with some amendments, it was finally adopted and submitted to the states on July 17, 1778. Eleven of the states ratified the plan in about a year, but Delaware delayed until 1779, and Maryland until 1781. Consequently the new government did not come into operation until March 2, 1781, nearly five years after independence had been declared and only two years before it was achieved.[1]

The Confederation a league

The system established by the Articles of Confederation provided not for a national government but for a "league of friendship" of politically independent states. Each state was to retain "its sovereignty, freedom, and independence and every power, jurisdiction, and right," not "expressly delegated to the United States in Congress assembled." The states were politically sovereign over their citizens, although for purposes of defense they delegated certain powers to Congress and although they had denied themselves the use of certain other powers; and this confederate government operated not through and upon the people but upon and through the several states. There were no people of the United States, but merely citizens of the several states subject not to Congress but to various state governments. Freedom of migration, intercourse, and commerce, extradition of fugitives from justice, and a mutual regard for the acts, records, and judicial proceedings of every state comprised almost all the rights and privileges granted by the Articles to the citizens of all the states. It was a league of sovereign independent states rather than a single unified government which was established in 1781.

It is operative not upon citizens but upon states

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[1] For official text of the Articles of Confederation and the final acts of ratification see *Journals of the Continental Congress*, Vol. XIX, pp 214-223

The Congress of the Confederation gave each state equal representation

The government established by these Articles was painfully simple. It consisted of an annual congress composed of not more than seven nor less than two delegates from each state chosen for not more than three years out of six, "with the power reserved to each state to recall its delegates or any of them, at any time . . . and to send others . . ." Each state was to support its own delegates, and in voting each state was to have but a single vote cast in accord with the decision of the majority of the delegation. Thus the principle of equality of representation which was discussed at the first meeting of the First Continental Congress was perpetuated in the formal constitution, and despite the objections of the nationalist element, state prejudices and jealousies were satisfied.

The executive power in Congress

For convenience and the necessary dispatch of business Congress could choose one of the delegates president, but he was in no sense an executive officer, merely a parliamentary chairman. All the executive power was in Congress itself or in the committees created by it. Furthermore, the executive power could not be exercised upon important questions without the assent of nine out of thirteen state delegations, any or all of whom might be made quickly responsive to state sentiment through the power of recall. Congress had no legislative power in the sense that it could enforce its own acts. It might pass resolutions, make requisitions, but the power of enforcement lay with the states. Congressional resolution lacked the sanction of law. A quasi-judicial power was given to Congress in that it might nominate a list from which commissioners should be chosen by lot to hear and determine disputes between two or more states. But the judgment of this "court" although declared to be final and binding was more like the award of a board of arbitration and could be enforced against an unwilling party only by arms.

The nine states rule

Legislative power

Judicial power

Congress had functions but not powers

Congress was thus the national executive, yet deprived of all original, independent executive power; the national legislature, yet its acts were not laws; the national judiciary, whose decrees had only a moral force. In itself it combined all national executive, legislative, and judicial functions, but lacked the vital strength to perform any of these. It was what it purported to be — an excellent instrument for a confederation, called into being at a time when a strong national government was needed.

Distribution of powers:

(1) Powers granted to Congress

The excellences of the scheme as a federation can be seen from the wise and careful distribution of powers between Congress and the states. Almost every power of purely general or national nature was given to Congress. Among other things it could declare and wage war on land and sea, control all diplomatic matters and make treaties, make requisitions upon the states for men and money, borrow money, emit bills of credit, determine the weight and fineness of coin and establish weights and measures, and establish and regulate the post office. Two important functions were denied to Congress — it had no power to regulate commerce nor could it raise money by taxation. Congress was expressly forbidden to make commercial treaties "whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities." It could make requisitions for money, but "the taxes . . . shall be laid and levied by the authority of the legislatures of the several states." Aside from these two important omissions there was almost an ideal division of functions — those of a general nature, affecting all, were granted to Congress; those of local nature were reserved to the states. Congress had duties and proper powers which concerned the whole country; the states were concerned with their own citizens.

(2) Powers denied Congress

Weaknesses of the Confederation

(1) Operated only through states

(2) The nine states rule

Two principles, however, prevented the proper execution of these powers. As has been pointed out, Congress could operate only through the states. In the second place, in all important questions connected with the above powers it was necessary to obtain the assent of nine of the states, thus giving to a small minority the power to block measures necessary not only in the civil affairs but in the crises of the war. The Articles, moreover, could not be amended or altered unless Congress should agree and the ratification of every one of the thirteen state legislatures be obtained. It was this practical impossibility of amendment, as much as any inherent defect in the Articles, which made progress impossible and which led to the formation of a new constitution.

(3) Amendments must be unanimous

The Failure of the Articles of Confederation

Criticism of statesmen

Even before the Articles of Confederation were adopted the plan was subjected to severe criticism by many of the more farsighted statesmen. The experience of the war had shown Washington the danger of a federal assembly without an executive, whether that assembly be the Continental Congress or a body organized under more formal authorization. The financial difficulties had convinced Robert Morris of the necessity of giving to the central government some more secure revenue than that which depended upon the requisitions from the states, while the shortsighted selfishness of the states disgusted Hamilton and led him to urge the idea of a strong national government.

Causes of failure

The failure of the Articles of Confederation arose from three different sources: (1) the readjustments made necessary by independence and the prevalence of revolutionary theories, (2) the violations of the fundamental provisions of the Articles, and (3) certain grave defects in the scheme of government itself which became obvious in actual practice.

Necessity of economic reconstruction after the Revolution

With the coming of peace, in 1783, freedom from war relieved the states from the more obvious necessity of submission to Congress. But peace did not bring prosperity. The high prices which prevailed during the war fell. The commissary of the British forces ceased to be a cash customer for the produce of the farmer, and all agricultural products declined in price. The profitable though precarious speculations in privateers stopped when it became unlawful to capture British merchantmen. The newly established manufactories, which had expanded with the high prices caused by the practical monopoly of the domestic market, now withered under the competition of immense British importations. American trade followed its natural channel to England rather than the artificial one created by the French treaty. The disbanding of the army brought back to their homes thousands of men for whom employment must be found, and in the face of hard times such a problem was doubly difficult. The years between 1783 and 1787 were years of hardship, a period when the economic relations of states were in the process of readjustment; but by 1787 trade relations were beginning to be reestablished, and by 1789 the country had returned to its normal prosperity and was expanding in new directions. It is a mistake to believe that the four years of depression were characteristic of either the period of the Revolution or the whole of the "Critical Period." While the depression was not due to the form of government, it made the task of government difficult and showed the weakness of the Confederation in dealing with such a crisis.[1]

Necessity for political readjustment

In another way the period of the Confederation was a period of experimentation and readjustment. As has been shown, the colonists were not democratic, but the necessity of justifying and making popular the Revolution had spread the doctrine of equality and natural rights. A great deal had been written about tyrants, and government and tyranny were frequently confounded. The overthrow of the settled colonial governments had not been accomplished without a price, and there was everywhere a relaxing of restraints and a lowering of standards which the more conservative viewed with alarm. It is true that the legal qualifications for the suffrage under the new state constitutions were not unlike those under the colonial charters, but respect for duly constituted authority had diminished, and if the unfranchised did not actually possess the suffrage, they increased in influence and began to demand either a share in the government or legislation in the interest of their class. The governing class, that is, the well to do, might legally thwart their wishes, but, however wisely refusal was made to the crude demands of the debtor class, it was fraught with danger. The armed uprising of Daniel Shays in Massachusetts and the imminence of anarchy in that state proved alike the risk to government by a minority and the need of some central government strong enough to assist the state authorities in preserving peace.

Habit of opposing government

These ideas of revolutionary freedom and natural rights were invoked not merely against the state governments but by the states against Congress. The colonies had asserted their "natural rights" to resist the authority of the British Empire;

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[1] For an excellent treatment see Edward Channing, History of the United States, Vol. IV, chap. xiii, "Economic Readjustments."

were they now to surrender these rights to an American government? They had not shared in the government of Great Britain, and the Revolution had emphasized the antithesis between their rights and the powers of the British government, but they had not yet learned that with their independence and popular institutions "there could be no antithesis between government and people, inasmuch as the people were the government, the possessors of the final political authority; what was called government was merely the servant of a power superior to itself."[1] The states now used their independence to thwart their own instrument, Congress, which had won their independence for them. "Natural rights," as interpreted by some of the states, meant state sovereignty in its most self-assertive form. Thus Rhode Island refused to ratify a congressional resolution laying a 5 per cent duty upon certain goods because she "regarded it the most precious jewel of sovereignty that no state shall be called upon to open its purse but by the authority of the state and by her own officers." Some states neglected their legal obligations and congressional requisitions were unpaid, while other states refused to allow amendments to the Articles lest their so-called sovereignty might be impaired.

State rights

Madison's criticism of the Articles:

In a paper prepared in 1787 Madison criticized most discriminatingly both the actions of the states and the framework of the government.[2] He found that the states had violated the compact in several fundamental and basic particulars. The states had failed to comply with the requisitions made by Congress. It will be remembered that Congress by the vote of nine states could call for money, but that the states, not Congress, had the sole right to lay taxes to meet these requisitions. The necessities of the states to raise and pay their own militia and to contribute only a part of the men Congress called upon them to furnish made them unwilling to assume further burdens. Moreover, after peace every state found itself struggling with what seemed to it an overwhelming debt, and many of the states

(1) Failure to comply with requisitions by Congress

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[1] A C. McLaughlin, The Confederation and the Constitution, p. 41 This volume contains the best brief account of the problems of the period and the framing of the Constitution written from the point of view of a strong nationalist.

[2] Writings of James Madison (Hunt's edition), Vol. II, p. 361.

had difficulties in raising enough money for their own legitimate and necessary expenses. Consequently they neglected, if they did not refuse, to comply with the legal demands of Congress. The effect was twofold. In the first place, such a violation of one of the fundamental principles of the Confederation weakened the whole structure. This Madison considered "as not less radically and permanently inherent in, than it is fatal to, the object of the present system." In the second place, failure to comply with these requisitions brought practical bankruptcy to Congress.

[Weakness of the Confederation and practical bankruptcy]

[Methods of financing the Revolution]

The war had been financed by four methods: (1) requisitions, (2) loans from European powers who from not wholly disinterested motives supported the revolt of the colonies against England, (3) loans from citizens, (4) paper money. During the war the requisitions produced very little revenue, and even this was paid in depreciated paper which the states had issued, following the example of Congress. In the first four years of the Confederation, Congress received less than one quarter of the amount it had called for, and in the last year before the adoption of the new constitution only about $500,000 was contributed by the states. This slight revenue failed to meet the necessities of the government and compelled it to go still further in debt. New debts were contracted and, most ominous of all, the interest on both the domestic and foreign loans fell into arrears. Between 1784 and 1789 the arrears of interest upon the domestic debt increased nearly fourfold and on the foreign debt about twenty-five-fold. So desperate was the situation that at one time the superintendent of finance, Morris, was obliged to draw upon a loan he hoped to obtain. Had not the Dutch given constant assistance, and lent over two millions to Congress, bankruptcy must have ensued.

[Public debts]

[Paper money]

The fourth and most fatal method of financing the Revolution was to print money. This, by a resolution of Congress, became a debt binding upon all the states who were pledged to redeem it. This paper money began to depreciate at once. By 1777 a depreciation of 33⅓ per cent was recognized by law in Pennsylvania. As a result prices had increased alarmingly, because the merchants tried to exact in quantity what the paper medium lacked in value, while the "debtors pursued their creditors in triumph, paying them without mercy."[1] Laws were passed to regulate prices, but the distrust of the people was more potent than legislation. The decline continued, and by 1780 Congress confessed bankruptcy and passed an act promising to redeem this currency at one fortieth of its face value. This only hastened the depreciation, and prices in this medium became absurd.[2] By 1781 paper money ceased to circulate and was bought and sold only for speculative purposes at rates varying from five hundred to one thousand dollars for one dollar in gold. From almost every point of view paper money had proved a curse.

[Why Congress issued paper money]

It is easy to-day to assert that Congress should have adopted other means. It must be remembered that the plan for paper money was adopted by the Second Continental Congress, which was simply a revolutionary body, depending for its support upon the tacit acquiescence of the states, and had neither formal sanction nor coercive power for its action. Not to do the best, but to do what it could, was the aim of Congress. Moreover, in 1776, the ablest men in America sat in Congress, shrewd politicians who perhaps were sound judges of the situation, and, seeing the impossibility of taxation, they adopted what many felt the poorer but only practical means to meet the crisis.

(2) Alliances between states

Madison held that the states had violated the Articles in another way by encroaching upon federal authority. By the Articles of Confederation the states were forbidden to negotiate treaties and to make war except in defense. Nevertheless Georgia had waged war against the Indians and had made treaties with them — a double violation since Congress was given charge of all relations with the Indians. Virginia and Maryland and Pennsylvania and New Jersey had made treaties to regulate the navigation of the Potomac and the Delaware Rivers in spite of the provision that "No two or more states shall enter into any treaty, confederation or alliance, whatever between them, without the consent of the United States in Congress assembled. . . ."

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[1] Quoted by C. H. Van Tyne, in "The American Revolution," p. 241.

[2] Thus tea was sold for from ninety to one hundred dollars a pound; Samuel Adams, always impecunious, bought a suit and hat for which he was forced to pay one thousand dollars; and Jefferson paid his physician three thousand dollars for two visits. — C. A. Beard, American Government and Politics, p. 39

It must be confessed that these violations were caused by the fact that Congress had no power to regulate or control navigation or commerce, and the necessities of the states may be pleaded. Nevertheless such unreproved violations disclosed the weakness of the Confederation in dealing with important problems and tended to weaken its authority in other matters.

(3) Violations of treaty obligations by states

Congress could negotiate treaties, and the states were forbidden to lay "duties which might interfere with such treaties." The states were, however, allowed to exact from foreigners the same duties as their own citizens were asked to pay, and Congress was expressly forbidden to make treaties depriving the states of this power. As a result of these contradictory provisions the whole foreign and commercial policy of the United States was at the mercy of the individual states. Violations of treaty obligations were numerous; Madison asserted that "not a year has passed without instances of them in some one or another of the states." So far foreign nations had shown moderation towards America, but, as John Adams found in England, it was impossible to negotiate a commercial treaty. Congress could lay no restrictions upon the states, and the states could render void any advantage which Congress had granted. Since Congress had nothing it could withhold, it had nothing it could give away.

(4) Commercial competition between states

The states themselves attempted to solve the commercial difficulties, but by selfish competition rather than by cooperation. When the other New England states closed their ports to Great Britain, hoping to extort some favorable commercial relaxations, Connecticut opened her ports to British importations. The states also competed for domestic commerce. New York burdened the trade from Connecticut and New Jersey, both of which retaliated. Pennsylvania discriminated against Delaware and New Jersey, while Maryland tried to limit the commerce of Virginia. The clause providing that the people of each state "shall enjoy herein all the privileges of trade and commerce" was a dead letter. It is true that in 1785 ten states passed acts granting the power of regulating commerce to Congress for the next thirteen years, but so numerous and contradictory were the restrictions contained in them that Congress was forced to refer them back to the states for revision.

(5) State issues of paper money

In another way the states had violated the spirit if not the letter of the Articles by the issue of paper money. By making bills legal tender they had violated the rights of the citizens of other states who were creditors. Not only were laws passed making these notes legal tender but it was attempted to compel the owners of goods and creditors to receive them under penalties of law. It has already been pointed out how the judiciary of Rhode Island refused to apply the forcing act, holding that it was unconstitutional and hence void. Moreover the states were forbidden to "coin money or regulate the value thereof," and although paper bills were not money the legal tender laws of the various states attempted to give them the character of money and fixed their value. As Madison pointed out, the exclusive regulation of the value of money was properly delegated to the federal authority.

(6) The Confederation lacked the power of coercion

These numerous and serious violations by the states, and the powerlessness of Congress to check them, disclosed the vital defect of the Confederation — it had no power.

Want of sanction to its laws and lack of coercion was Madison's criticism.

> A sanction is as essential to the idea of law as coercion is to that of government. The federal system, being destitute of both, wants the great vital principles of a political constitution. Under the form of such a constitution it is, in fact, nothing more than a treaty of amity, of commerce, and of alliance between independent and sovereign states.

[Social unrest within the states required the aid of Congress]

It was this lack of coercive authority which compelled the Congress to sit helpless in the face of the violations by the states and the other evils which followed. The states themselves were in danger of domestic violence, as Shays's rebellion showed, and Congress was helpless to guarantee them security. There was need for concerted action, not merely in foreign affairs but in commerce and in national development, yet progress could be defeated by the perverseness of particular states whose concurrence were necessary. The obedience of the states could not be relied upon, and Congress could not compel it. Much of the legislation of the states was superfluous, and laws were "repealed or suspended before any trial can have been made of their merits and even before a knowledge can have reached the remote districts within which they were to operate." Congress had no power to control or annul this divergent state legislation, even though it should be contrary to the Articles. There was no judicial power in Congress like the state courts, which might refuse to execute a state law because it contravened the Constitution; Congress in its judicial capacity could only hear disputes between the states.

(7) The Confederation lacked popular support

The Confederation was weak because it had never been ratified by the people. "In some states the Confederation is recognized by law and forms a part of the Constitution. In others it has received no other sanction than that of legislative authority." The state governments had accepted it; and since the state governments were sovereign their laws, not the acts of Congress, were to be enforced by the state courts, and their government, not that of Congress, operated upon the people. As has been said, the principal defect of the Confederation lay not in its powers or in the lack of them but in the fact that it was a mere confederation struggling to perform the functions of a national government. The dangers which confronted the American nation demanded not the jealous rivalry of thirteen state legislatures but the cooperation of all the people. The basis of the government must rest upon the people and it must address itself not to the states in their corporate capacity but to the people individually.

ATTEMPTS TO AMEND THE CONFEDERATION

Hamilton's proposals, 1780

The experience of the war had proved the necessity of strengthening the national government. Even before the Articles of Confederation were ratified by the requisite number of states there was a movement for a constitutional revision. In 1780 Hamilton, in a letter to Duane, frankly criticized the defects of Congress and the frame of government. Lack of power was the greatest weakness, in his judgment. He proposed that a general convention should be called by the states and a new confederation planned. This confederation should give "Congress complete sovereignty, except as to that part of internal police which relates to the rights of property and life among individuals and to raising money by internal taxes. It is necessary that everything belonging to this should be regulated by the State Legislatures. Congress should have complete sovereignty in all that relates to war, peace, trade, and finance; and to the management of foreign affairs; the right of declaring war; of raising armies, officering, paying them, directing their motions in every respect; of equipping fleets, and doing the same with them; of building fortifications, arsenals, magazines, etc., etc.; of making peace on such conditions as they think proper; of regulating trade, determining with what countries it shall be carried on; granting indulgences; laying prohibitions on all the articles of export or import; imposing duties; granting bounties and premiums for raising, exporting, or importing, and applying to their own use the product of these duties — only giving credit to the States on whom they are raised in the general account of revenues and expenses; instituting admiralty courts, etc.; of coining money; establishing banks on such terms and with such privileges as they think proper; appropriating funds, and doing whatever else relates to the operations of finance; transacting everything with foreign nations; making alliances offensive and defensive, treaties of commerce, etc., etc."[1] In the following year Washington declared that a mere nominal executive was not sufficient and that Congress should be given the controlling power and the right to regulate all matters of general concern. He saw, as Hamilton and Madison had seen, that the great defect of the Confederation lay in its lack of coercive power, that the states could not be relied upon, and that Congress could not compel obedience.

Washington's proposals, 1781

Attempts of Congress to amend the Articles

With the adoption of the Articles Congress felt its weakness and began to seek methods of strengthening itself. In 1781 a committee reported an amendment giving Congress the power to use the force of the United States to compel states to fulfill their federal obligations. Six months later Randolph, from another committee, reported that the Confederation required execution in twenty-one different ways and recommended seven amendments.[2] These were not submitted to the states as a whole, but Congress twice, in 1783 and in 1784, proposed amendments giving it power to levy duties upon certain imports.

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[1] H C Lodge, The Works of Alexander Hamilton, Vol. I, pp. 224–225.

[2] August 22, 1781; *Journals of the Continental Congress*, Vol. XXI, p 893.

In both instances unanimous consent could not be obtained, and the proposals were defeated because of the votes of single states. In 1785 acts were passed by ten states giving Congress the power of regulating commerce for thirteen years, but these were so contradictory that nothing could be accomplished. In 1786, in urging the acceptance of the revenue amendment of 1783, Congress declared that the crisis had come and that it was impossible to preserve and maintain the faith of the federal government by the temporary requisitions of the states.[1]

The development of the idea of amendment by a convention

As has been shown, in 1780 Hamilton suggested the plan of calling a convention for the framing of a new constitution, and in 1782 the assembly of New York recommended such action. In 1784 certain members of Congress discussed the advisability of such a plan, but no formal action was taken. In 1785 the Massachusetts General Court passed a resolution calling upon Congress to call a convention, but her delegates refused to present these resolutions to Congress. In this same year, however, the plan for a convention received unexpected assistance. Virginia and Maryland were attempting to settle their dispute concerning the navigation of the Potomac. All the states were invited to send delegates to attend a convention at Annapolis to consider the question of duties and commerce in general. At this convention delegates from only five states were present, but among them was Hamilton, who reverted to his plan for a revision of the Articles and succeeded in persuading the convention to pass a resolution asking the states to send delegates to a convention to be held at Philadelphia "to consider the Articles of Confederation and propose such changes therein as might render them adequate to the exigencies of the Union." This resolution was sent to the state legislatures and by them transmitted to Congress. In February, 1787, Congress assented to the plan and issued a call for a convention "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states, render the federal constitution adequate to the exigencies of the government and the preservation of the Union."

Annapolis convention, 1786

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[1] G. T. Curtis, Constitutional History of the United States, Vol. I, p. 232.

All the states except Rhode Island responded. In all, sixty-two delegates were appointed in various ways from the twelve states. Most of these delegations, however, were strictly bound by their instructions to the consideration of amendments. It may well be doubted whether the response would have been so general had it been imagined that an entirely new constitution was to be the result of the deliberations of the convention.

CHAPTER III

MAKING THE CONSTITUTION

While the delegates were assembling at Philadelphia the leaders in the movement for a new constitution came to an understanding as to the method of procedure. The formal organization was completed on May 25, and four days later Randolph, the ablest speaker of the Virginia delegation, presented a plan prepared by Madison in the form of fifteen resolutions. These resolutions, the so-called Virginia plan, formed the basis of the deliberation of the convention and the foundation of the new constitution. They provided not for a mere amendment to the Articles but for the framing of a new system under the guise, later abandoned, of enlarging the powers of Congress.

THE VIRGINIA PLAN

(1) Single executive

According to this plan there should be a single national executive who, with a "convenient number" of the national judiciary, should exercise a veto upon the acts of Congress. The national judiciary was to be established to try cases of (1) piracies, (2) cases in which foreigners might be interested, (3) cases with respect to the collection of the national revenue or the national peace and harmony, (4) cases of impeachment. Congress was to consist of two Houses, proportional to the quota of contributions or to the numbers of free inhabitants of the states, the lower branch of which should be elected by the people of the states and the upper house by the lower from those nominated by the state legislatures. This body was to exercise all the powers of Congress under the Confederation and also could legislate in "all cases in which the harmony of the United States may be interrupted by the exercise of individual legislation" by the states. It also had power to negative the laws of the states which were contrary to the articles of

(2) National judiciary

(3) Congress of two Houses proportional either to population or contributions

union and "to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof."[1]

Shortly after this plan was presented Randolph offered three brief resolutions embodying the fundamentals of his plan. These declared that a mere federal union would not accomplish the object of the Confederation, that no treaties among the states as individual sovereignties would be sufficient, and that a national government ought to be established consisting of a supreme legislature, executive, and judiciary. After a brief debate these were agreed to, Connecticut voting No and New York being divided on the third.

The convention decides on a new constitution

The convention had apparently come to the conclusion that no mere amendment would be sufficient. The delegates from the large states and the national element were in control and had pushed their case rapidly. Yet, although the convention had overwhelmingly decided for what seemed a new form of government, the discussion of the details revealed the existence of groups holding very diverse opinions which prolonged the debates and produced compromises not only in details but in some of the more fundamental features.

Opposition to proportional representation

The discussion over representation first revealed the existence of these parties most clearly. Should the new national legislature continue the practice of the Confederation and recognize the principle of state sovereignty by giving to each state an equal representation? Or should wealth or population or a combination of both be considered, and representatives be apportioned according to one or both of these standards? It was the old discussion which had faced the First Continental Congress at its first session, and it clearly revealed the existence of at least three lines of opposition to the Virginia plan.

Opposition to the Virginia plan:

(1) State sovereignty

The most fundamental ground of opposition was that a federation, not a national government, was desired. Once admit the desirability of a national and not a federal system and much of the opposition to proportional representation vanished. As has been seen, even during the Revolution the states were loath to surrender their powers to the Continental Congress, and after peace was declared ignored or refused its requests. Active state sovereignty saw no room for a strong national government. A treaty or a federation best satisfied these states. Hence arose logically the second line of opposition — that the Articles of Confederation were correct in principle but needed amendment. The experience of the past years had shown this; and the opponents of the Virginia plan were ready to make concessions and to give to Congress many additional powers, but the principles of the Confederation must remain unaltered. Whatever different motives moved these parties, the division was best seen in the grouping of the large states on the side of the Virginia plan for a national government and of the smaller ones in opposition. The reason was obvious. If the smaller states allowed the larger ones their true proportional representation, they would be outvoted. They feared oppression; their pride suffered, for as sovereign states they felt themselves the equals of the others. Whatever motives were operative the debate turned into a struggle between the large and small states over the questions of representation.

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[1] Elliot's Debates, Vol. I, 143–145.

(2) Revision of Articles, not new Constitution, needed

(3) Large versus small states

THE NEW JERSEY PLAN

On June 15 Paterson of New Jersey laid before the convention a scheme known as the New Jersey plan, embodying the principles of the opponents of the plan for strong national government.[1] It was merely a revision and enlargement of the Articles of Confederation. The idea of a confederation was retained, and each state had a single vote in Congress which still consisted of a single chamber. A plural executive was to be elected by Congress to enforce the acts of Congress and to appoint the federal officers not otherwise provided for. Additional powers were given to Congress so that it could raise taxes by levying duties upon imports, regulate commerce and trade, both foreign and domestic, and make requisitions which if not paid within a specified time could be collected as Congress might direct. A federal judiciary was to be created

(1) Single chamber, each state one vote

(2) Plural executive

(3) Congress given power to tax imports and regulate trade

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[1] Elliot's Debates, Vol. I, pp. 175–177.

(4) Judiciary to enforce national laws and treaties

having jurisdiction over impeachments, captures on the high sea, all cases in which foreigners should be interested, and cases in which the construction of a treaty was concerned or "which may arise on any of the acts for the regulation of trade, or the collection of federal revenue." A valuable and interesting contribution was found in the seventh article of the plan, which declared "that all acts of the United States in Congress assembled, . . . and all treaties . . . shall be the supreme law of the respective states so far as those acts or treaties shall relate to the said states, or their citizens; and that the judiciary of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding." Perhaps unintentionally the authors of the New Jersey plan had contributed the most valuable single principle — the idea of securing the supremacy of federal acts by means of the courts, state as well as national. It was the development of this idea which makes the Constitution and all treaties and laws made in pursuance thereof "the supreme law of the land."

The merits of both plans were set forth at length by both parties, but the small state party through threats of secession extorted compromises. The whole Constitution is a compromise, and it conceals many of its most distinctive features to concentrate the attention solely on the three compromises of representation, slavery, and commerce. The real compromise was between an efficient national government and a federation. On many points the nationalists won substantial victories, but the Ninth, Tenth, and Eleventh Amendments did much to satisfy those who preferred the federal system. Usage, interpretation, and the Fourteenth Amendment have increased the national features of the system until its present functions and powers are far beyond what even the nationalists in the convention planned.

THE COMPROMISES OF THE CONSTITUTION

Compromises over the executive

The experiences of the Confederation were fresh in mind, and the new Constitution was devised so that these faults should not be repeated; but everywhere in the institutions they created and the powers they granted is seen the compromise between the parties. A national executive was created, serving for a short term, but reeligible; chosen not by the legislatures of states but by electors who represented the local majorities in the states. A legislature was established consisting of two houses; in one the equality of the states was recognized and each state had two votes, to be given, however, not as a state but as the individuals who represented the state should determine. The idea of a federation of states was further recognized in the election of the senators, who were to be chosen not by popular vote but by the state legislatures. In the House of Representatives the principle of popular sovereignty was recognized, and the members were chosen by the people in accordance with the population of the states. It was in the composition of the legislature that two of the famous compromises were made. The composition of the Senate satisfied state pride; that of the House gave weight to population. Moreover, in determining the population of a state slaves were to be reckoned as three fifths of their actual number. Again, in the powers granted to Congress is seen a compromise. At one stage in the debates of the convention it was proposed that Congress should have such general powers as the needs of the Union should require. This was not agreed to, and by a compromise Congress was given specific powers. Taking the division of powers between state and national authority as found in the Articles as a basis, such new powers were given to Congress as experience had shown to be necessary. Congress had all the powers of the old confederation and, in addition, could levy taxes, lay duties, regulate trade, and make all laws necessary and proper for the execution of the specific powers granted. In this division of powers the third of the three most frequently mentioned compromises is found — Congress could regulate commerce, but could not forbid the slave trade until 1808.

Compromises over legislature

Apportionment of representation

Compromises over powers granted to Congress

While the specific powers of Congress were enlarged, the prohibitions on the states were increased. Attempts were made to prevent the recurrence of the evils experienced during the Confederation, and the states were forbidden to emit bills of credit, to make anything but gold or silver legal tender, to pass any law impairing the obligation of contract, or to lay duties upon exports

Prohibitions on the states

or imports. Fear of federal encroachment led to the adoption of the Ninth and Tenth Amendments, which, if they did not weaken the instrument, were intended to prevent its expansion by legislation. By the Ninth Amendment it is declared that the enumeration of certain rights shall not be construed to deny others retained by the people, while the Tenth Amendment reserves to the people or the states those powers not expressly granted to the government and not expressly forbidden to the states. These two amendments not only satisfied the opponents of nationalism but did much to give the Constitution a rigidity which has kept the system close to the letter of the original document.

Fear of federal encroachment

The federal judiciary

In addition to executive and legislative departments a national judiciary was created. Its jurisdiction extended over all cases arising under the Constitution or the laws and treaties made under it. The Constitution and laws of the United States were declared to be the supreme law of the land, and the judges of all courts were bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." This assertion of a national law which should be enforceable by the courts was, strangely enough, a development of the New Jersey plan, and in the hands of the party for strong government became its greatest victory. Even Madison was puzzled as to the method of dealing with a delinquent or refractory state, and it was not until the convention was well advanced that the principle of operation upon individuals rather than upon states was discovered. The cumbersome and dangerous method of attempting to compel the government of a sovereign state to do its duty was fortunately abandoned, and the laws made under the liberal powers granted to Congress were made enforceable in the ordinary courts not upon defiant states but upon disobedient individuals. The declaration that the laws of Congress were the laws of the land transferred their enforcement from causes for diplomatic negotiation into simple cases at law. The Supreme Court, moreover, also served as the tribunal for disputes between states and was given jurisdiction in cases where two or more states were concerned and in suits brought by citizens against a state. Part of this power, however, was withdrawn as a result of the

Acting on individuals insures federal supremacy

Eleventh Amendment adopted in 1798, by which a state was declared immune from suit by citizens of another state or a foreign state. State sovereignty was thus satisfied, but the Constitution is perceptibly weaker than when it came from the convention.

In another way the judiciary exercised power. The declaration that the Constitution was the supreme law of the land gave to the court the power of judicial review of both state and national legislation. As has been shown, this principle was not new and the colonies had been accustomed to a somewhat analogous action by the Privy Council. It has also been noted that in cases of conflict the courts of the states enforced the provisions of the state constitutions rather than the acts of the legislature. By utilizing this principle the convention avoided grave difficulties. At one time it was proposed that the national legislature should have a veto upon the acts of the states, but this was fortunately discarded and a simpler and safer method of control was found. The supremacy of the Constitution was declared and the judges bound to enforce it. The states could not be jealous of the power of a judiciary which had no power of veto but which simply enforced, in a case of conflict, the supremacy of the higher law. Constitutional questions were removed from politics, and the action of the court was confined to the case before it. Its decision dealt not with the wisdom or justice of the act, but in every case asserted the authority of the higher law. Thus an ascending series of laws was created, — state laws, state constitutions, federal laws, and the national Constitution, — each of which was enforced in its own sphere. The court was truly what it has been so often called, the guardian of the Constitution.

In case of conflict federal judiciary enforces the higher law

The judiciary and the assertion that the Constitution was the supreme law of the land were the central features of the Constitution. Without them the system would fall to pieces. By them the various parts are cemented together and the various functions made to articulate. By them the federal law is brought to every citizen and the federal Constitution is preserved from attack.

From another point of view the Constitution shows the spirit of compromise — the compromise between democracy and conservatism. The Revolution increased and emphasized the democratic

Compromise between democracy and conservatism produced checks and balances

element in the country, for without utilizing the strength of those who possessed no share in the government the war could not have succeeded. Yet the new state constitutions were not much more democratic than the old colonial governments. The conflict between the propertied governing class and the unfranchised had been one of the difficulties with which the states had to contend. The members of the convention were not democrats; many of them believed that all the evils of the Confederation had come "from the excess of democracy," and it was held "that property was the primary object of society." The problem, as they saw it, was so to construct the government that the rights of property would be safeguarded against the attacks of the multitude and yet erect a government which should be republican in form and spirit. Fear of monarchy and fear of democracy produced the checks and balances of the system.

Separation of the departments of government

To prevent the usurpation of any one department of the government a careful separation of powers was devised. The president was given powers sufficient to make him a strong executive, yet he shared with the Senate the diplomatic and appointing power and with Congress his power to make war. Congress was explicitly granted wide powers, and experience has shown that their field can be still further extended by interpretation, but the assent of the president was necessary to every law unless two thirds of each house overrode his disapproval. Finally, the acts of both the president and Congress were subject to the review of the courts and might be tested by the standard of the Constitution. The three departments were not formally declared separate,— indeed, each must at some time touch the others,—yet in the instrument the sphere of each was clearly marked out and legal usurpations rendered impossible.

Check on election of the president

The checks and balances were carried still further by the method of choice of the agencies of the government. The election of the president was intrusted not directly to the people but to electors chosen by the states, and a majority of the votes of these electors was made necessary for election. The rise and development of political parties soon rendered this electoral college a mere body of registration. But it is important to remember that the will which is registered by this body is not necessarily the will of the majority of the people, but the sum of the majorities in the various states. The term of the president is short, but reelection is not prohibited, though custom has apparently set the limit of two terms for any one man.

Check on election of Congress

The legislative department also shows the fear of democracy. The senators were chosen by the legislatures of the states for terms of six years, one third changing every two years, and were thus expected to be the champions of conservatism. The members of the House were elected directly every two years. At one stage in the convention it was proposed to have the representatives chosen, like the senators, by the state legislatures, but it was held wise to give the government as broad a base as possible, and it was decided that the representatives should be chosen directly by the people, each state, however, determining the franchise. The different terms of the president, senators, and representatives and the different methods of election were felt to give security against the unexpected capture of the government by any faction. Thus departmental usurpation, democracy, and monarchy were guarded against.

Method of amendment combines stability and flexibility

In the method of amendment the convention improved upon the Articles of Confederation. In that system the assent of all the states had been necessary to effect a change, and it has been seen how Rhode Island prevented the adoption of the financial amendment. The old method was a proper one for a confederation of sovereign states where each member was sovereign and equal. But the old Confederation was a failure. The convention framed a national constitution responsive to the majority and not capable of being thwarted by the will of a single state, and yet not so weak as to be at the mercy of the momentary whim of a chance majority. It was to combine stability and flexibility. The scheme adopted was a twofold process and involved the framing and ratification of the amendment. To frame an amendment it was necessary that two thirds of both Houses should agree on the proposed measure or that upon the application of the legislatures of two thirds of the states Congress should call a convention to frame the amendment. As a result of either method the assent of three fourths of the states was necessary, given either by their legislatures or by conventions. The compromise between nationalism and confederacy is here seen, as well as the one between the fear of democracy and the necessity for progress. The ratification depends upon state action; and however great the popular demand ratification is not by popular referendum, and no matter how great a popular majority may be rolled up, unless three fourths of the states agree the measure is defeated. With the massing of population in certain states and the admission of thinly settled states it has been calculated that in theory one fortieth of the population could defeat the will of the other thirty-nine fortieths. To accomplish this, however, it is necessary to combine all the small states, a thing practically impossible because of their divergent interests. On the other hand, amendment and change are possible even in the face of opposition by certain large interests in certain states. That the Constitution is not easily amended has been considered one of its good features, but that it can be amended when the necessity has been clearly shown has brought satisfaction if not improvement.

THE RATIFICATION OF THE CONSTITUTION

When the work of the convention was done the question as to ratification of the Constitution arose. Legally, according to the Articles of Confederation, the new Constitution should be submitted to Congress and, when agreed to by all the different state delegations, should be transmitted to the state legislatures, whose unanimous consent would be necessary for ratification. Since Rhode Island was not represented at the convention her adoption of the Constitution was unlikely, and the acceptance of the instrument by all the state legislatures was problematical. The convention, therefore, disregarding the provisions of the Articles, inserted the provision that the ratification of nine states should be sufficient for the establishment of the Constitution between the states so ratifying. The completed Constitution was transmitted to Congress with an urgent resolution that Congress should submit it to conventions summoned for the purpose of considering it in the various states. Congress somewhat reluctantly agreed and transmitted the Constitution to the states. The campaign for ratification lasted over a year, and at times the

Method of ratification

result seemed doubtful. Delaware ratified it unanimously, December 7, 1787; Pennsylvania followed suit; in New Jersey and Georgia there was again unanimity, and only a slight minority in Connecticut. In Massachusetts there was more danger. The men who had "been out with Shays" disliked the provisions against paper money, and there were some influential men, revolutionary leaders, whose attacks upon all government and whose apostrophes of liberty were well remembered. Chief among these were Samuel Adams and John Hancock, but when their influence was secured success seemed more possible. Even then the decision was doubtful until the method of ratification with suggested amendments was devised.[1] This proved a happy expedient and was followed by six states. On June 21, 1788, New Hampshire, the ninth state, completed the number necessary for ratification; four days later Virginia and a month later New York gave their assent. North Carolina delayed until 1789 and Rhode Island until 1790.

"The Federalist"

The campaign for ratification produced much discussion and several pamphlets of great value. Chief among these is "The Federalist," a series of papers by Hamilton, Madison, and Jay, urging the adoption of the Constitution and explaining its merits. With great learning and keen analysis the authors disclosed the weakness of the old Confederation and emphasized the excellences of the new system. Not only were the features of efficient government set forth but an attempt was made to quiet the apprehensions of monarchy and tyranny. Although "The Federalist" was frankly a partisan campaign document it is the best contemporary exposition of the Constitution.

Origin of national political parties in ratification contest

As a result of the campaign for ratification political parties were solidified. The friends of a strong and efficient government acted together for the adoption of the Constitution. Those who believed in reducing the powers of the national government to a minimum opposed the ratification. When the new system was put in operation these political divisions continued over the question of liberal or literal interpretation of the Constitution — the strict or loose construction of its powers — and formed the beginnings of the first two great political parties.

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[1] See S. B. Harding, The Contest over the Ratification of the Federal Constitution in Massachusetts.

The Bill of Rights

The various state conventions had submitted over one hundred amendments to the Constitution on which Congress was called to act. The most common criticism was that the instrument lacked a Bill of Rights. As has been seen, most of the state constitutions contained such articles, and the political philosophy of the time demanded such satisfaction. Consequently Congress yielded. And in spite of Hamilton's assurance that such declarations were unnecessary, as the Constitution was a document granting specific powers, Congress submitted twelve amendments to the states, ten of which were adopted. The first eight amendments deal with private rights, and will be later examined, while the Ninth and Tenth deal with the reservation of powers, preserving to the state or the people all powers not explicitly granted. Thus the doctrine is emphasized that the Constitution creates not a sovereign government but a government subordinate to the people, —a government of delegated powers, sovereign, it is true, within its sphere, but subordinate not to the will of the state governments, as the Confederation had been, but to the people acting through the process of amendment. Thus the people, not the state governments, have withdrawn powers by the Eleventh Amendment and granted new powers by the Fourteenth and Seventeenth and Eighteenth Amendments. But Congress on its own initiative cannot widen its field of action by the exercise of any power not granted to it. Unlike the sovereign Parliament of Great Britain, Congress is subordinate to the Constitution, and the people are sovereign.

CHAPTER IV

CONSTITUTIONAL PRINCIPLES

THE CONSTITUTION OF THE UNITED STATES ONE OF DELEGATED POWERS

Parliamentary sovereignty in England

One of the most striking features of the Constitution of the United States, and one which distinguishes it most clearly from the constitution of Great Britain, is the sovereignty of the people. In England, Parliament is legally sovereign, or, to be more accurate, the king in Parliament, while the actual sovereignty is exercised neither by the king nor Parliament but by the House of Commons and the Cabinet. The important thing to notice, however, is that Parliament possesses the legal sovereignty, actual and uncontrolled. It has the power not only to pass any and all legislation but also to alter and amend the very constitution under which it acts. Thus, in 1716, a Parliament, elected to sit for three years, prolonged its own existence by the passage of the Septennial Act; and in 1911 Parliament very greatly limited the power of the House of Lords. No act of Parliament can be unconstitutional since Parliament is sovereign, and for a like reason no act is beyond the competency of Parliament. Parliament is thus at once an uncontrolled legislative and constituent assembly.

Popular sovereignty in the United States

Such power in the United States resides not in Congress, nor in any department of the government, nor in the states, but in the people. The first sentence of the Constitution clearly expresses the American theory in sharp contrast to the English theory: "We the people of the United States . . . do ordain and establish this Constitution for the United States of America."

The Constitution was not the work of the old Congress nor of a committee of Congress but of an extra-legal body, a constituent assembly, whose work was without legal force until approved and ratified by some other body. Doubtless it was

The Constitution adopted not by Congress or the state legislatures but by the people in conventions

the intention of Congress that it should consider the work of the convention as it had debated the proposed amendments to the Articles of Confederation, but with extraordinary self-denial it submitted the Constitution directly to the states. Here again, in the ratification by the states, is seen the emphasis given to the sovereignty of the people. Not the ordinary state legislatures but specially summoned constituent conventions accepted the work of the Philadelphia convention. All that Congress or the various state legislatures did was to summon conventions to pass upon the proposed new frame of government. Nowhere in the framing or the adoption of the Constitution were the legislative departments of the governments primarily employed.

The Constitution the grant of the people

The Constitution, then, not being made by Congress nor the state legislatures but containing limitations upon the powers of both Congress and states, becomes the supreme law of the land. The Constitution somewhat resembles the old colonial charters or the newly adopted state constitutions in that it is a grant of authority from some superior body. Instead of a grant from the crown, as were the old charters, the new Constitution, like the state constitutions, was the grant of the people themselves acting in their sovereign capacity through specially summoned conventions. The government of the United States is thus not sovereign, like Parliament, for both the governments of the states and the government of the nation depend upon their constitutions — the grants of the people. Both Congress and the state legislatures are thus subordinate legislative bodies subject to the limitations of their constitutions and deriving their powers from the superior unlimited sovereign — the people.

The government limite by the delegation of powers in tl

The fact that the Constitution is one of delegated powers and does not grant unlimited sovereignty is emphasized by the Ninth and Tenth Amendments. When the Constitution came from the framers there were grants of powers to Congress and prohibitions upon both the states and Congress, but these did not seem sufficiently explicit to the people in the ratifying conventions. Six states proposed amendments dealing with the non-delegated powers. It might be argued, as did Hamilton, that since the government was one of delegated powers it could act only according to the delegation, but the people needed reassuring. Hence, from the various propositions offered by state conventions, Madison framed what became the Ninth and Tenth Amendments:

> IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Thus the fact was formally stated that the government was one of delegated powers and one in which all powers not delegated are reserved to the authorities granting the Constitution.

The government limited, but not by explicit delegation

Even this declaration was weaker than many wished it, for at one stage in the debates upon the amendments it was urged that it should read, "the powers not expressly delegated. . . ." Fortunately, however, this was dropped. As a result, while Congress or the officers of the government only exercise powers within the field of delegated authority, it is not necessary to show that the form of action is explicitly granted. This principle was clearly set forth by Chief Justice Marshall in *McCulloch* v. *Maryland*, where he said:

Marshall on implied powers

> This government is acknowledged by all to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

[illegible]

And again in the same opinion he said:

> . . . But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This the court disclaims all pretensions of doing.[1]

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[1] 4 Wheat., 316, 405, 421, 423.

Characteristics of powers delegated to the federal government

It is characteristic of the powers delegated to the national government that they are of a political nature.[1] The Constitution did not attempt to establish a code of laws to regulate all the relations of life, but rather to create a political system, part national and part local, capable of achieving the objects set forth in the preamble: "To form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty."

Political institutions

The greater part of the Constitution is taken up with the description of the political institutions of the government, — with Congress, its composition, and with the president and the complicated method of election, — while the powers of each department are disposed of in relatively few words. Thus it is significant that of the ten sections of the first article, which establishes the national legislature, only one contains grants of power, and these powers, ample as they have been found to be, are concerned with international or national relations, with defense and the maintenance of national authority, rather than with the relations of man to man.

National government prohibited from domestic legislation

That the powers of the national government are political rather than domestic is still further emphasized by the fact that the prohibitions laid upon the states are not upon the passage of domestic or social regulations as much as they are upon the exercise of those political functions which the hard experience of the Confederation had demonstrated should be vested in the national government. Even further — the federal government is especially prohibited from legislating upon certain fundamental rights, and although Congress cannot deprive a man of "life, liberty, or property, without due process of law," there was nothing to prevent a state from doing so until the adoption of the Fourteenth Amendment in 1868. The powers delegated to the national government therefore deal with international relations, with defense, with interstate relations, together with the most vital of all powers — the power to levy taxes, to pay the public debts, and to provide for the common defense and general welfare.

Such being the nature of the powers delegated to the United States, the characteristics of the powers reserved to the states

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[1] F. J. Stimson, The American Constitution, pp. 14-16.

Powers reserved to the states deal with the social and personal rights of the citizens

or to the people are obvious. The social and personal rights of the citizens are in the care of the states. To protect these rights the states have full authority and power, while prohibitions are expressly laid upon the national government. These prohibitions are found enumerated in express terms in Article I, Sect. ix, and in the first eight Amendments, — the so-called Federal Bill of Rights, — which places beyond federal interference the fundamental rights of the citizen. Again, these prohibitions are implied in the Ninth and Tenth Amendments, by which all powers not delegated are reserved to the states or to the people. Experience, interpretation, legislation, and desire have widened the scope of the powers granted to the national government, but have added no new ones; only an amendment can do that. This has been done four or possibly five times.[1] In the Thirteenth, Fourteenth, and Fifteenth Amendments, adopted to end the slavery contest and secure to the negro the rights which the abolitionists thought necessary, are found clauses which deal not with the fundamental framework of the government but with the states in their relation to their own citizens. The clauses "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" have brought consequences quite unexpected by the makers. While the last clauses of these three amendments give Congress the power to enforce, by appropriate legislation, the provisions of these articles, such legislation has never been satisfactory. But the judiciary in enforcing the provisions of the amendments has invalidated many state laws passed to regulate the social or domestic relations of their citizens. For example, the judicial definition of "due process" and "liberty" prevented the state of New York from regulating the hours which bakers might be employed. And it should be noted that it is the application of the restrictions contained in these articles which has aroused the most severe criticism of the

Judicial interpretation extends federal control

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[1] The Sixteenth Amendment, which allows Congress to levy an income tax, without apportionment among the states, enlarges a power which was exercised previously to the decision of the court in 1894.

court. Time and experience have shown that the framers of the Constitution were wise in leaving to the states almost complete control over the social relations of their citizens. For although uniformity was sacrificed and the danger of backward and unwise legislation not prevented, the rights of the individual citizen depended upon the local government of his own state, which was most familiar with his needs and more easily subject to his control.[1]

Specific distribution of powers between the federal government, the states, and the people

The Constitution of the United States creates a federal government. It provides not merely for the organization of the national government but it presupposes and recognizes the existence of state governments which have very definite functions and far-reaching powers. The Constitution thus divides the total power of a sovereign state between two authorities, the state and the national, and defines the functions of each and prevents the one from encroaching upon the other. Furthermore, since the powers which the national government may exercise must be found delegated to it by the Constitution, and since there are very definite restrictions placed upon the states in the exercise of certain powers, there is left a "neutral zone," or sphere, upon which neither the states nor the nation can encroach. These rights and powers are those reserved to the people in their sovereign capacity and can only be exercised by means of a constitutional amendment.[2]

(1) Powers granted exclusively to the federal government

It is thus possible, as Professor F. J. Stimson has done, to place the phrases of the Constitution into certain categories, or classes. Without attempting to examine in detail the entire elaborate classification of Professor Stimson, it is suggestive to consider some of his categories. The first class would include those powers granted exclusively to the government of the

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[1] The Eighteenth Amendment, adopted in 1919, prohibiting the manufacture or sale of intoxicating liquor is the most recent and from some points of view the most far-reaching extension of the federal power in the field hitherto reserved to the states It should be remembered, however, that this extension was the result not of congressional action but of constitutional amendment.

[2] For a most suggestive and detailed treatment of this topic, see F. J. Stimson's "Federal and State Constitutions," chap. iii, and "The American Constitution," especially chap. iv, also the frontispiece, which is a chart showing graphically the distribution of the powers, placing each clause and section of the Constitution in its proper category.

United States and also expressly prohibited to the states. This is the "field of Centralization, of Imperialism"[1] and in it the government of the United States is exclusively sovereign. As has been said, the powers thus delegated are almost all political in their nature. They provide for the organization of the three departments of the government and grant to each very definite powers. These specific grants will be examined in detail in later chapters, but it is to be noted that in the clauses granting the powers to each department are to be found phrases capable of expansion by interpretation. Thus, in the grant to the legislative department, in Article I, Sect. viii, clause 18, is found the celebrated elastic clause:

(*a*) Legislative powers

> The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

[The "Elastic Clause"]

Moreover, in addition to this clause there are found phrases in the same section which, according to the present trend of interpretation and legislation, extend the power of the national government into what was once the field of state action. Clause 3 gives Congress the right to regulate the commerce between the states and with foreign nations; clause 4, the right to establish uniform laws concerning bankruptcies throughout the United States; clause 7, the right to establish post roads and post offices. The fraud orders of the Post Office to protect investors, the Pure Food Law, and the far-reaching activities of the Interstate Commerce Commission are a few of the extensions of the federal authority under these clauses.

[Commerce, bankruptcy, and postal clauses]

In like manner the powers granted to the president include powers which at times have enabled him to overshadow the other departments of the government. In addition it must be remembered that as chief executive, charged with the enforcement of the laws, he has wide discretionary powers which even the courts will not question. From the phrase which gives to the United States courts the jurisdiction over suits between citizens of different states has come more far-reaching power

(*b*) Powers of president

(*c*) Extension of the jurisdiction of the federal courts

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[1] F. J. Stimson, The American Constitution, p. 172.

than perhaps was contemplated by the framers when state lines were more frequently boundaries of state activities. It is well to bear in mind in this connection that corporations are technically citizens of the state in which they are incorporated, and as most corporations operate in more than the state of their incorporation, suits to which they are parties are thus frequently carried to the United States courts. Furthermore, the great increase of federal legislation is constantly bringing more and more cases formerly settled in the state courts before the federal courts.

(2) Concurrent powers

A complete analysis of the Constitution would indicate the powers which are granted to the federal government but not prohibited to the states (like the great power of taxation) and those powers which are exercised jointly by the combined action of the states and the federal government (like the protection of a state in time of domestic violence); but the next great obvious division is one containing those powers which are reserved to the states and prohibited to the federal government. These most truly are the states' rights in the best sense of the words. The states exercise, independently of the United States, the right to choose their senators, representatives, and presidential electors, while, by the Eleventh Amendment, a state cannot be sued by private individuals without its consent. The broadest grant of states' rights, however, is found in the Tenth Amendment, which reserves to the states or to the people all powers not granted to the national government by the Constitution. Hardly anything could be more comprehensive, and since the states are sovereign they may exercise any right not prohibited by the Constitution.

(3) Powers reserved to the states and prohibited to the United States

(4) Prohibitions on states

The next important division includes those powers which are forbidden to the states. These, as have been shown, deal chiefly with the political organization of the federal government and contain certain prohibitions designed to insure the successful working of the federal system. These are found in Article I, Sect. x, and in Article IV, but the Fourteenth Amendment, in the attempt to protect the negro, invaded the domain of states' rights by prohibiting the infringement of the so-called natural rights of life, liberty, and property from state action.

(5) Prohibitions on the federal government

In like manner the United States government is forbidden to do many things. These may be divided into prohibitions made necessary by the federal system, like "no State, without its consent, shall be deprived of its equal suffrage in the Senate," [1] or "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," [2] prohibitions upon the departments of the government to define their activities, and, finally, very fundamental and far-reaching prohibitions designed to protect the fundamental rights of the citizen.

(6) Prohibitions on federal and state governments

Again, there is to be found a zone containing prohibitions upon both the United States and the states. These include the qualification for the president, senators, and representatives, their method of election, and the protection of their privileges; also the far-reaching Article VI, clause 2, which guarantees federal supremacy. In addition, the Thirteenth Amendment prohibits slavery, and the Fifteenth guarantees the right of suffrage against infringement "on account of race, color, or previous condition of servitude."

(7) Powers reserved to the people

There yet remains to be considered what powers the people have reserved to themselves. The most obvious answer would be, all powers not delegated to the United States nor forbidden to the states. The Constitution goes further, however, and by express words and necessary implication reserves to the people, according to Professor Stimson, not less than seventy-seven rights.[3] Here again it is possible to find distinctions in the kind of powers reserved. The first class may be called political, dealing with the organization of the government, and includes the doctrine of the separation of the departments of government, which grants legislative power to Congress, executive power to the president, and judicial power to the courts. By far the greater part of the reservation deals with the fundamental rights of the citizens, with the protection of life, liberty, and property which, lying in the neutral zone, can only be touched by a constitutional amendment.

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[1] The Constitution of the United States, Article V.

[2] Ibid. Article I, Sect. ix, clause 6.

[3] F. J. Stimson, The American Constitution, p. 133.

The protection of personal liberty

The right of personal liberty is protected against federal encroachment by the Fifth Amendment.[1] It is also protected against state infringement by identical words to be found in the Fourteenth Amendment. Yet more particular guarantees are to be found. Article I, Sect. ix, clauses 2, 3, and 8, prohibit the suspension of the great writ of habeas corpus, except in cases of rebellion or invasion, prevent the passage of ex post facto laws and bills of attainder, the granting of any title of nobility; Article III, Sect. ii, guarantees jury trial, while Sect. iii defines treason and the penalties for it. Amendments V, VI, VII, and VIII reaffirm the right of jury trial, guarantee to the accused the privilege of counsel and witnesses, and prohibit excessive bail or cruel punishments. In addition to these, provisions for personal liberty, freedom of speech, religion, and assembly are found in the First Amendment; while the right to bear arms, and protection against the quartering of troops in time of peace, are secured by the Second and Third Amendments.

The protection of property

Property is also adequately protected against both the state and federal governments. There are in Article I very definite limitations upon the taxing power of the federal government: all bills for raising revenue must originate in the House of Representatives; all duties, imposts, and excises must be uniform; direct taxes must be distributed according to population; and no money drawn out of the treasury except according to law. Among the powers denied to the states are provisions protecting property: no state shall coin money, emit bills of credit, make anything but gold or silver a legal tender in payment of debts, nor pass any law impairing the obligation of contracts. Moreover, the limitation in Amendment V against the federal government taking property for public use without giving compensation prevents confiscatory legislation and seriously limits the right of the government to acquire property by eminent domain. This same principle is applied to the states in the Fourteenth Amendment in the words, " nor shall any State deprive any person of . . . property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

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[1] No person shall be deprived of "life, liberty, or property without due process of law. . . ." — The Constitution of the United States

The supremacy of the Constitution thus protects the citizen in his fundamental rights

Thus, as has been said, the Constitution does more than create the framework of the government and distribute the functions among the national and state authorities: it also protects the citizen in his most fundamental rights. Since the Constitution is the supreme law of the land, the courts of the United States are the agencies by which the laws of the United States are enforced and the citizen protected in his most essential right against encroachment by either the United States or the states. Federal supremacy is not merely the power of the federal government to enforce its own laws but also the power to protect its citizens in these great natural and fundamental rights against all attacks.

FEDERAL SUPREMACY [1]

Federal and state sovereignty

One of the chief causes of the failure of the Articles of Confederation was the lack of a successful assertion of the sovereignty of Congress. In fact, Congress was not sovereign; the Confederation was but a league of sovereign states. The new Constitution attempted the difficult and hitherto impossible task of creating a federal system — a sovereign state composed of sovereign states. Actually each state surrendered portions of its sovereignty to the federal government, and thus by that extent ceased to be sovereign; while the federal government was created of delegated powers, but possessed of full, absolute, and sovereign authority within the field of power delegated to it. Thus it is hardly correct to speak of either the states or the federal government as completely sovereign, for both depend upon the people who have prohibited the states to exercise certain powers and have both granted and limited the authority which has been delegated to the national government. Nevertheless, within the sphere granted to it by the Constitution the national government is supreme.

This supremacy has been many times questioned and challenged by the states, but never successfully. From the earliest

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[1] This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. — The Constitution of the United States, Art. VI, clause 2

Federal supremacy asserted by judgment against states

years of the government under the Constitution the courts have uniformly upheld the federal government against the attempted assertions of state sovereignty within the field assigned to the national government.[1] For example, as early as 1793 the Supreme Court upheld its right to entertain a suit against a state brought by a citizen of another state, a decision which produced the Eleventh Amendment.[2] In 1794 the court intimated that it would disregard a state law which conflicted with a treaty, and in the succeeding years the supremacy of the federal law was asserted, while in 1809, in the case of *United States* v. *Peters*,[3] the Supreme Court, in sustaining a mandamus, enforced a judgment of the federal district court contrary to an act of the legislature of Pennsylvania. In asserting this right Chief Justice Marshall said:

Against state legislative action

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

In 1810 and 1812 decisions of similar character were rendered, and in 1819, in *McCulloch* v. *Maryland*,[4] in annulling a state law the doctrine was put forth that a state cannot, in the exercise of its powers, interfere with the operation of a federal agency. Thus Marshall reasoned:

> The states have no power, by taxation or otherwise, to retard or impede, burden, or in any manner control, the operation of constitutional laws enacted by the federal government. This is, we think, the unavoidable consequence of that supremacy the Constitution has declared.

Decision of state courts subject to federal review

In maintaining this supremacy the court in 1816 and 1821 asserted the power to review, on writs of error, decisions of state courts which were alleged to interfere with or infringe upon federal rights. Even during the period when the court under Taney favored a liberal interpretation of the powers reserved to the states, it unhesitatingly enforced the supremacy of the federal authorities in the exercise of duties which unquestionably belonged to the federal government. In the case of *Ableman* v. *Booth*,[1] in 1859, where the highest court of Wisconsin had released a prisoner sentenced by a United States court for violation of the Fugitive Slave Law, Taney upheld the doctrine of federal supremacy in these words:

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[1] W. W. Willoughby, The Constitutional Law of the United States. Vol. I, chaps. iv, v.

[2] *Chisholm* v. *Georgia*, 2 Dall. 419.

[3] 5 Cranch, 115, 136.

[4] 4 Wheat. 316.

No state judicial power may interfere with federal prisoners

> No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.

The Civil War a challenge of federal supremacy

The doctrine of federal supremacy was thus consistently and peacefully enforced up to the time of the Civil War. The passage of the various ordinances of secession was, however, a concerted defiance of this doctrine. Such action was directly contrary to the doctrine which had been hitherto enforced by the court and stated in a most masterly manner by Marshall in these words:

> . . . The people made the Constitution, and the people can unmake it. It is the creature of their will, lives only by their will. But this supreme and irresistible power to make or to unmake, resides in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it.[2]

Federal right to enforce laws

Acting in the spirit of these words, President Lincoln, in his first inaugural, rightly held that the secession ordinances were illegal and void. But since it seemed impossible to coerce sovereign states, it was his duty not to make war upon the states but to obey the constitutional injunction laid upon him and "take care that the laws be faithfully executed." In so doing he utilized force not against states as such but against rebellious individuals. Legally there was no war between the states — although circumstances soon compelled the observances of the rules of war — but merely the utilization of force sufficient to maintain the federal supremacy. There was no declaration of war by Congress, nor was there a treaty made at the close of the war, but the Confederacy collapsed with the surrender of the various generals to the Union forces.

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[1] 21 How. 506, 524.

[2] *Cohens* v. *Virginia*, 6 Wheat. 264, 389.

Since the Civil War the supremacy of the national government has not been defied. Indeed, the utilization of the power of the government to maintain peace within the various states has been sanctioned by the courts. Thus, in *ex parte Siebold*,[1] it was said:

Federal right to maintain order

> We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

In 1894, in the Debs case, the court said, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care."[2]

Federal courts enforce federal supremacy in private suits

Thus, although the enforcement and maintenance of federal supremacy is in the last resort in the hands of the executive department of the government, the determination of whether this supremacy has been infringed or violated is a judicial question and must be decided by the courts of the United States. By Article III, Sect. ii, of the Constitution the jurisdiction of the courts is defined; in some cases the Supreme Court is given original jurisdiction, in others appellate jurisdiction, under such rules and regulations as Congress shall make. Acting upon this, Congress, in the great judiciary act of 1789[3] and in the subsequent amendments, has made it possible for the federal courts to take jurisdiction over all cases in which a federal right or law has been construed adversely to the power of the federal government, and, by means of appeals, writs, and other judicial processes, has made it possible for the court to protect the agents of the national government against interference by state tribunals and thus to enforce the rights and powers granted by the Constitution within the boundaries of the states. Thus assertion of federal supremacy is a judicial question, — not a contest between the federal government and the government of a state, but a judicial determination of the rights claimed by a citizen under the federal Constitution.

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[1] 100 U S. 371, 395.

[2] *In re Debs*, 158 U. S. 564.

[3] See pp 63, 392 note.

METHODS OF ASSERTION OF FEDERAL SUPREMACY

Appeal to federal courts

Federal supremacy is maintained in several ways. First, by the appellate power granted to the Supreme Court by the Constitution and exercised under such laws as Congress shall make. By the judiciary act of 1789 cases may be carried from the state courts to the courts of the United States upon writs of error, if the judgment of the state court has been against a federal law or right or if the state court has upheld a state law or right contrary to a claimed federal law or right. This clause has been seriously questioned only three times. In 1816 the court of Virginia denied the constitutionality of the act, but was overruled in *Martin* v. *Hunter's Lessee*.[1] Again, in *Cohens* v. *Virginia*,[2] Marshall held that the clause did not contravene the Eleventh Amendment, and such an appeal because started by the state was not a suit against a state. Again, in 1859, Wisconsin endeavored, unsuccessfully, to resist this appellate power in the attempt to render void the Fugitive Slave Law, but the right was vindicated by Taney in the case of *Ableman* v. *Booth*.[3]

Removal to federal courts

A second way in which federal supremacy is maintained is by the removal of a case from the courts of a state to the federal courts. This right has been invoked to protect federal officers in the exercise of their duties. The principle is thus set forth in *Tennessee* v. *Davis*.[4] Davis, a revenue officer, in the exercise of his duties, killed a man and was arrested by the authorities of the state. When his case came to trial he demanded that it be removed to a federal court under the authority of a law of the United States authorizing such a removal. The state asserted that the crime, that of homicide, was not one against the federal but against the state laws. This was of course admitted by the federal authorities, but it was claimed that inasmuch as the defendant was a federal officer who was performing his duties, the case should go before the federal courts. In sustaining this position the court said:

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[1] 1 Wheat. 304.

[2] 6 Wheat. 264, 389.

[3] 21 How 506, 524

[4] 100 U.S. 257, 263

Protection of federal officers

> It [the federal government] can only act through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the state court, — the operations of the general government may at any time be arrested at the will of one of its members.

Not only may the federal government exercise affirmative power to enforce federal law and rights, but the state courts are prohibited from interfering with the judicial processes of the federal courts. This was firmly established in 1872 in the case of *United States* v. *Tarble*,[1] where, in checking an attempt of a state court to discharge a federal prisoner by a writ of habeas corpus, the court used the following words:

State powerless over federal prisoners

> Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in case of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. . . . State judges and state courts, authorized by the laws of their states to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused.

In recent years the United States courts have gone even further, and have themselves, by writs of habeas corpus, removed

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[1] 13 Wall. 397, 407, 409.

Habeas corpus to protect federal rights of state prisoners

persons charged with offenses against state laws from the custody of the officers of the state. This power is derived from a series of statutes beginning with the judiciary act of 1789, which allowed the use of the writ only in cases where the persons were detained under the authority of the United States, and culminated in the amendment of 1867, whereby the writ might be issued in all cases where any person might be restrained in violation of the Constitution or any treaty or law of the United States. The most extreme use of this writ was seen in the Neagle case, where a deputy marshal who had committed homicide when acting according to an executive order, but not upon the authority of any statute, was transferred from the jurisdiction of the California officials to that of the United States.[1]

Federal agencies protected against encroachments by the states

Not only do the courts by these means maintain the independence of the federal agents and assert the supremacy of federal law, but all federal agencies within the states are protected from state action which might interfere with the efficient performance of their functions. One of the earliest assertions of this principle was in the celebrated case of *McCulloch* v. *Maryland*.[2] The state of Maryland denied the constitutionality of the act establishing the United States Bank and attempted to tax its branches operating in Maryland. In deciding the case adversely to the state, Marshall used the following reasoning:

from taxation by states which may impair their efficiency

> That the power to tax involves the power to destroy, that the power to destroy may defeat and render useless the power to create, that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.
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> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax papers of the customhouse; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

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[1] See pp. 178–179.

[2] 4 Wheat 316.

This decision, however, does not prevent the taxation of federal agencies whose efficiency was not interfered with by such taxation. The following rule was laid down in *National Bank* v. *Commonwealth*.[1]

Present rule concerning state taxation of federal instrumentalities

> It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agencies of the federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the state. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is that the agencies of the federal government are only exempted from state legislation so far as the legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.

In like manner Congress may by statute allow the state to tax federal property of certain kinds; for example, by the act of 1894 the notes of national banks may be so taxed, but such taxation must be in accord with congressional legislation and form an exception to the general rules.

Conversely, it was held in *Collector* v. *Day*[2] that the federal government could not levy an income tax upon the salaries of state officials. The reasoning laid down a principle which has been generally followed:

Conversely, Congress may not tax state instrumentalities of government

> And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of

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[1] 9 Wall. 353, 361–362

[2] 11 Wall. 113, 127.

another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax at discretion?

What is a republican form of government?

Among the guarantees of the Constitution to the states are a republican government and protection against domestic violence. The term "republican form of government" has been interpreted to mean such a form of government as existed in the states at the time of the adoption of the Constitution — one in which the officers of the state were responsible to the people and selected by them. Such a definition, it has been held, was not violated by denying the suffrage to women,[1] since in all the states the suffrage was restricted, and only in New Jersey was it granted to women. Nor, according to the decision of the New York court, is it violated by the use of the referendum, in which a democratic rather than a representative system is followed.[2] In 1912 the Supreme Court refused to pass upon a case involving the use of initiative and referendum, holding that it was a political rather than a judicial question. The case is so important that the following portion of the reasoning of Justice White may be noted:

The court will not pass upon the form of government. This is a political question to be decided by Congress or the president

> Do the provisions of Sect. iv, Article IV, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the states of a government republican in form may be secured, a conception which after all rests upon the assumption that the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation?
>
> We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.[3]

[1] *Minor* v. *Happersett*, 21 Wall. 162.

[2] W. W. Willoughby, The Constitutional Law of the United States, Vol I, p. 154.

[3] *Pacific States Telegraph and Telephone Co.* v. *Oregon*, 223 U. S. 118, 142, 143

No federal review of discretionary acts taken by the president to protect the states against domestic violence

To protect the states against domestic violence Congress has given the president certain powers. In the exercise of these powers the president is called upon to use his discretion as to which of the contending parties he considers the lawful government. In the case of *Luther* v. *Borden*[1] the court held that this was an executive act and not reviewable by the court.

Congressional reconstruction

At the close of the Civil War the courts construed the clause guaranteeing a republican government in such a manner as to authorize Congress to establish and maintain governments within the states which had seceded. In so doing, perhaps from the necessities of the situation, what were practically military governments were set up until the states had complied with certain conditions laid down by Congress.

Federal supremacy protects private rights against state not personal action

Lastly, the Fourteenth Amendment, which forbids any state to deprive any person of life, liberty, or property without due process of law or to deny to any person the equal protection of the laws, has vastly extended the sphere of federal supremacy. Although by the *Slaughter House Cases*[2] it was held that a citizen gained no new rights which the courts could enforce, and by the decision in the *Civil Rights Cases*[3] it was held that the provisions of this amendment did not give Congress the right to provide penalties for the violation of the rights of citizens by private persons, the amendment has greatly extended the jurisdiction of the courts. They may take cognizance of and review cases in which "due process" is not followed or equal protection of the laws not given. Federal supremacy is thus asserted and limitations placed upon the states, and federal judges can enforce their conception of justice by granting relief from the laws of the states which run counter to this conception.

Federal determination of state and federal spheres of action

Thus, although the states are sovereign within the sphere not granted to the federal government, the limits of this sphere are determined not by the states but by the federal government. Even more, the guarantees which the Constitution gives to certain rights — perhaps few in number but of fundamental importance — are supported and maintained in the last resort by the federal courts and the federal authorities whose decision, if necessity arises, may be enforced by the military power of the government.

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[1] 7 How. 1.

[2] See pp. 75, 76, 77.

[3] 109 U. S. 3.

SEPARATION OF POWERS

The colonist's conception of the English constitution:

In the eyes of the colonists the English constitution exemplified the theory of the separation of powers. The long struggle of Parliament with the Crown had ended in the independence if not in the triumph of the legislature. The Bill of Rights had placed the judiciary beyond the reach of royal interference. The prerogatives of the Crown, greater in theory than in actual practice, seemed to secure to the executive a wide field of action free from the interference of either of the other departments. The cabinet system was not fully developed, and thus to distant observers it might fairly appear that in England alone of all the states of Europe there was a genuine separation of the departments of government. This observation was strengthened by the teachings of the theoretical writers who unhesitatingly laid down the rule that such a separation was necessary to liberty.

(1) Confirmed by Montesquieu

"When the legislative and executive powers are united in the same person, or in the same body of magistrates," said Montesquieu, "there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." And again: "There is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator; were it joined to the executive power, the judge might behave with violence and oppression."[1] This opinion of the philosopher was also held by the great English commentator Blackstone, who said, "In all tyrannical governments, the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man or one and the same body of men; and wherever these two powers are united together, there can be no public liberty."[2]

(2) Confirmed by Blackstone

(3) Confirmed by colonial experience

Experience, moreover, had accustomed the colonists to the practical advantages of this theory. Every colony had an executive appointed or elected, but, whether appointed or elected, he was not responsible to the legislative body. The independence of the executive was less evident in Connecticut and Rhode Island, where he seemed to be little more than the agent of the assembly, but it reached its highest point in the royal provinces, where he possessed very substantial prerogatives. The judges were commissioned by the Crown, irremovable alike by the governor or the legislature. And in every colony there were legislative assemblies with such wide powers that they were often enabled to encroach upon the other departments of the government.

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[1] Spirit of Laws, Bk. XI, chap. vi, W. T Nugent, translator.

[2] Blackstone, Commentaries, Bk. I, chap. ii, p. 146.

(4) Confirmed by state constitutions

During the revolutionary era this principle reappeared in six of the newly formed state constitutions, varying from the brief declaration of Maryland — "That the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other" — to the elaborate and sonorous article in the Massachusetts Bill of Rights:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men.

[No separation of powers in the Articles of Confederation]

Under the Articles of Confederation, however, this idea was abandoned, and Congress in itself possessed all the legislative, judicial, and executive power which the jealousy of the states would grant to the central government. So weak did the Confederation prove that not tyranny but inefficiency resulted from this mingling. Hence it was not surprising that a resolution was adopted in the early days of the Constitutional Convention declaring "That a national government ought to be established consisting of a supreme legislative, executive, and judiciary." In the final draft of the Constitution there is no such definite statement of the principle as is found in the constitution of Massachusetts, but in the description of the departments the theory is plainly shown. Thus: "All legislative powers herein granted shall be vested in a Congress of the United States . . . ,"[1] and "The executive power shall be vested in a President

Separation of powers as expressed in the Constitution:

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[1] The Constitution of the United States, Article I, Sect. i.

of the United States of America,"[1] and "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,"[2] imply adherence to the principle.

(1) The president

The Constitution attempts to render each of these departments independent of the others in various ways. The president, contrary to the early expressed wish of the majority of the convention, is chosen not by Congress but indirectly by the people of the states. He is irremovable except by impeachment, and holds office for four years, a period of different length from the representatives, senators, and judges. Only in the case of the failure of the states to give a majority of electoral votes to any one candidate can Congress act, but custom and legislation have given to that body the power to pass upon the electoral vote of the states. In like manner the members of the two Houses of Congress are chosen by a different process and for different terms from the president and the judges. Still further to protect its independence each House is made the final judge of its own membership and can discipline its own members, who are furthermore protected and rendered free from arrest, except for serious crimes, and cannot be held liable for words spoken or printed by them as members. The judges of the United States are made independent of the legislature and executive alike by a fixed term of office — life; they are subject only to removal by impeachment; and they are given a compensation which cannot be diminished during their term of office.

(2) Congress

(3) The judiciary

Separation of powers as interpreted by the courts

The interpretation given by the courts to these provisions has given legal force to the political theory. Thus, in *Kilbourn* v. *Thompson*,[3] in deciding that the House of Representatives had no authority to punish a witness for refusing to testify concerning his private affairs, the court applied the doctrine in these words:

> It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments — the executive, the legislative, and the judicial; that the

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[1] The Constitution of the United States, Article II, Sect i.

[2] Ibid Article III, Sect. 1, clause 1

[3] 103 U. S. 168, 190.

functions appropriate to each of these branches of government shall be vested in a separate body of public servants; and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions.

Exceptions:

(1) The president in relation to Congress and the courts

Yet this division of powers, so clearly expressed, has, as the court observed, certain notable exceptions. The president is a part of the legislature. Not only must his assent be given to every act of Congress, unless two thirds override his veto, but he is directed to give information to Congress. To what extent the president thus becomes a legislative leader will be later discussed,[1] but Professor Ford points out that rarely has Congress been able to thwart the strongly expressed desire of an executive. Certainly under the pressure of war this is true, as the second administration of Wilson showed. In like manner the president may encroach upon the function of the judiciary. Not only does he, with the advice and consent of the Senate, appoint the judges but he exercises a quasi-judicial power of pardon, and through his appointed officers, the United States attorneys, initiates all prosecutions.

(2) Legislative control over the executive and judicial departments

So, too, the legislature may encroach upon both the executive and judicial departments. All important officers are appointed by the president, with the advice and consent of the Senate, and the Senate's approval is necessary for the ratification of every treaty, while for most international agreements further congressional action is required. As will be shown, many of the powers which the president exercises are the result of congressional legislation, which, although extending the power of the president, may at some subsequent time, by repeal, withdraw the power granted. Over the courts Congress exercises more power than is realized. The Constitution provides for the creation of but one court, the Supreme Court, and even here leaves to Congress the power to determine the number and compensation of the judges. Still more significant is the fact that the appellate jurisdiction of the Supreme Court is dependent to a large extent upon congressional action. Hence it is within the possible power of Congress to interfere very seriously with the independent operation of the court.

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[1] See pp. 168–174; 368–373.

(3) The supremacy of the courts

The court itself, in maintaining the supremacy of the Constitution and of the federal law, quite frequently interferes with the other departments, executive and legislative alike, by refusing to give effect to the acts of Congress or by granting relief from the acts of officials; and the unfriendly critics of the courts, and even some of the judges, have held that by interpretation the courts are exercising judicial power to such an extent that the charge of judicial legislation is justified. It must be remembered, however, that such action of the courts is not legislative in its origin but merely the judicial assertion of the principles of the Constitution.

Minor exceptions

In minor ways each department exercises all the powers of the others. The judges have some independent appointing power, and some legislative power in making rules for procedure. The executive exercises a quasi-legislative power in the making of administrative regulations and considerable judicial power in enforcing them both with and without appeal to the courts. The legislative appoints its own officers and participates in the appointment of others, disciplines its own members, and, under certain circumstances, may punish outsiders for contempt of its authority.

What then becomes of the theory of the separation of the departments? The real principle has thus been stated:

True statement of the theory of the separation of powers

> . . . The correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which from their essential nature do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions. . . . Generally speaking it may be said that where a power is not peculiarly and distinctively legislative, executive, or judicial, it lies in the authority of the legislature to determine where its exercise shall be vested.[1]

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, pp. 1263, 1264.

The fact that each of the departments of the government may at times and under certain circumstances appear to encroach upon the prerogatives of one, if not upon both, of the other departments has led to the most emphatic statements of the theory of separation of powers. These statements, however, made in the heat of political conflict, are rather to be considered as attempts to gain supporters than as serious charges of breaches of our constitutional system.

Jefferson's attack upon the judiciary

Thus the expansion which the Constitution received by the interpretation the Federalist Chief Justice Marshall put upon it enraged Jefferson and led him to make violent denunciations. "... If," he wrote, "the judiciary is the last resort in relation to the other departments of the government, ... then indeed is our Constitution a complete *felo-de-se*. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too which is unelected by, and independent of, the nation."[1] In recent times, as well, the charge has been made that the court is encroaching upon the legislative branch of the government, and by judicial legislation was accomplishing what Congress never intended. This view found some support in the court itself, when Justice Harlan dissented from the opinion rendered in the Standard Oil case in these words:

Harlan's criticism of judicial legislation

> They [the courts] have no function to declare a public policy, nor to amend legislative enactments.... Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely, by interpretation of a statute changed a public policy declared by the legislative department.[2]

Encroachments of the legislature

During the administration of Andrew Johnson, when the victorious Republicans were attempting to enforce their ideas of reconstruction of the governments of the Southern states, Congress assumed a predominant place in the government. The Tenure of Office Act was but one of the encroachments of that epoch, but the very violence of Johnson's denunciations of this measure alienated some who might have joined in criticizing such congressional usurpation.

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[1] Letter to Judge Spencer Roane, September 6, 1819, in "Writings of Thomas Jefferson" (P. L. Ford, ed.), Vol. X, p. 140

[2] *Standard Oil Co.* v *United States*, 221 U.S. 1, 104.

Extension of the powers of the executive

In recent years the executive department has come to the fore. Both President Roosevelt and President Wilson have extended certain powers to the utmost, not merely in the prescribed constitutional methods but in ways which, while legal, were hardly contemplated by the framers. Appeals have been made to the people, and the whole power of the president as a party leader has been utilized to force Congress to pass desired legislation. This has not gone unrebuked. During Roosevelt's administration members of both parties accused him of executive usurpation. Since the United States entered the war vast powers have been added to the president's already rather undefinable war power. Even this great power has been extended by congressional legislation, so that there is little wonder that President Wilson's political opponents raise the cry of executive usurpation.

Explanation

But, as has been said, these attacks are made usually by the parties aggrieved, not so much because of a breach of the theory of the separation of departments as because of the fact that they themselves are not the beneficiaries. Each department, according to its critics, has been guilty of such usurpation, but it is equally true that each department has not hesitated to extend its functions when necessity seemed to demand it. At different times public attention has been focused upon different departments and public opinion has functioned through them. At such times the department which best serves the interest of the people and possesses their confidence receives added extra-legal duties and powers. Its field of activity is extended at the expense of the other departments, and although it may be criticized by them it can rest assured of popular approval and support.

CITIZENSHIP AND INTERSTATE RELATIONS

As has been shown, the Constitution of the United States is one of delegated powers. It creates a national government sovereign within the sphere granted for its action, but it also

Double citizenship in the United States

recognizes and provides for other authorities operating with equal sovereignty within their own spheres. The people of the United States are thus subject to two separate and different jurisdictions, and from each are derived certain rights and privileges. Two distinct citizenships are thus created — state and national. In the original and unamended Constitution this was recognized in the clauses which provided that the president must be either a natural-born citizen or a citizen of the United States[1] and in giving to the citizens of each state all the privileges and immunities of citizens in the several states.[2] Hence, it becomes necessary to determine who are the citizens of the states and who are citizens of the United States, and what immunities and privileges attach to each kind of citizenship.

The problem was made more definite and simplified by the adoption of the Fourteenth Amendment, which declared:

As defined by the Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This defines federal or United States citizenship, and certain rights and immunities and privileges are specified as attaching to it which are beyond the power of the states to touch.

Four questions are thus presented for consideration, which, if answered in the following order, will clarify the subject: (1) Who were the citizens of the United States before the adoption of the Fourteenth Amendment? (2) What were the privileges and immunities of these citizens? (3) What was the effect of the Fourteenth Amendment upon the definition of United States citizenship? (4) What are the privileges and immunities which now attach to such citizenship?

In the original Constitution there was no definition of United States citizenship; in fact, there was surprisingly little discussion of the question before the decision of the Dred Scott case in 1857. In 1874, however, in a case which arose out of the Fourteenth Amendment, there was an attempt made to define citizenship and its immunities and its privileges as it existed before the adoption of that amendment. In *Minor* v. *Happersett*[1] the court said:

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[1] The Constitution of the United States, Article II, Sect. i, clause 4.

[2] Ibid. Article IV, Sect. ii.

United States citizenship before the Fourteenth Amendment as defined by the court

> Whoever, then, . . . was one of the people of these States when the Constitution was adopted became *ipso facto* a citizen — a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was consequently one of its original citizens. As to this there has never been a doubt. Disputes have arisen as to whether or not certain persons or certain classes of persons were part of the people at the time, but never as to their citizenship.
>
> Addition might always be made to the citizenship of the United States in two ways. first by birth and second by naturalization. . . .
>
> The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became, themselves, upon their birth, citizens also. These were natives or natural-born citzens as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first.

The immunities of United States citizens before the adoption of the Fourteenth Amendment were never exhaustively defined. Justice Washington, however, in a case before the circuit court of Pennsylvania, made an attempt, which, as far as the particular case was concerned, was an obiter. This has been sustained by subsequent decisions and is quoted with approval in the *Slaughter House Cases*. Justice Washington said concerning the immunities of the United States citizens:

Immunities of United States citizens

> They may all, however, be comprehended under the following general heads: protection by the government, with right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.[2]

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[1] 21 Wall. 162, 167.

[2] 16 Wall. 36, 76.

Briefly this means that (1) the protection of the government of the state, (2) the right to acquire, hold, and dispose of property upon the same terms as citizens of the state, and (3) the right of free entrance and removal from the state are guaranteed to the citizens of the United States.

Effect of the Dred Scott decision

In 1857, however, in the decision of the Dred Scott case[1] which denied a negro the remedies of the courts because the Constitution of the United States did not act upon one of the negro race whenever he "shall be made free under the laws of a state and raise him to the rank of a citizen, and immediately clothe him with all the privileges of a citizen of any other state, and in its own courts," the doctrine was put forward without dissent that a state could not confer federal citizenship. The majority of the court, however, went even further and held that at the adoption of the Constitution free negroes were nowhere recognized as citizens, and that no state could at any time subsequent to the adoption of the Constitution endow negroes with the rights of citizenship which might be protected by the courts.

The Fourteenth Amendment reverses the Dred Scott decision

Without further examination of the reasoning or questioning its historical accuracy, it is sufficient to remember that this doctrine did not meet with general approval and was reversed by the Fourteenth Amendment. Since the adoption of that amendment the definition of both federal and state citizenship has been removed from the realm of judicial theory and has been explicitly stated. All persons who are born in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the states in which they reside. Absolute accuracy thus would refer to a citizen of the United States and a resident of a state.

Immunities of United States citizens since the Fourteenth Amendment as defined by the court

What has been the effect of the Fourteenth Amendment upon the immunities which by both the fifth Article and the Fourteenth Amendment are given to citizens of the United States? This was exhaustively discussed in the *Slaughter House Cases*, where the obiter of Justice Washington was quoted with approval, and the assertion made that it was not the intent of the amendment to transfer the protection of all civil rights from the states to Congress. Rather it was held that the immunities and privileges of the United States citizens were the same as had been guaranteed to the citizens of the several states, the amendment merely adding a prohibition upon their infringement by the state.[1]

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[1] 19 How 393

Limitations of privileges of state citizenship

Certain limitations of the privilege of state citizenship must be noted. The privileges which a citizen enjoys within his own state cannot be carried into another state and there enjoyed contrary to the laws of that state. This is but another way of saying that the laws of a state have no force outside of its own boundaries. Thus, while it was held in *Ward* v. *Maryland*,[2] that Maryland could not require a citizen of another state to take out a license for the sale of certain goods not manufactured within the state, it has been repeatedly held that a state may prohibit or limit the sale or use of certain articles within its own boundaries, provided such regulations apply alike to residents and nonresidents of the state, and are genuine police regulations and not undue restraints upon commerce. Thus a citizen of

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[1] ". . . We venture to suggest some which owe their existence to the Federal government, its national character, its Constitution or its laws. One of these is well described in the case of *Crandall* v *Nevada* (6 Wall 35) It is said to be the right of the citizen of this great country protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to subtreasuries, land offices, and courts of justice in the several States . . .'

" Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when upon the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not upon citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendment, and by the other clause of the Fourteenth next to be considered." — 16 Wall. 36. 79–80

[2] 12 Wall. 418.

Massachusetts could not claim the right to sell intoxicating liquor in Maine when such sale was prohibited to residents and nonresidents alike, although he was allowed to sell such liquor under certain conditions in Massachusetts. In like manner " . . . the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State."[1] Thus the privileges of profiting by the oyster beds in Virginia might be reserved to the citizens of that state. So also the property which a citizen of a state has in the free education offered by the state in which he resides cannot be enjoyed in a state in which he is merely temporarily living.

Political privileges granted by states

It is furthermore to be noted that the political privileges, the right to vote and the right to hold office, are not included in either the definition of the privileges common to all citizens or to United States citizens. These are determined by the laws of the several states, and before the passage of the Fourteenth and Fifteenth Amendments a state could withhold the right to vote from any class it might desire. The Fifteenth Amendment prohibited disfranchisement on account of race, color, or previous condition of servitude, while the Fourteenth attempted to provide penalties for withholding the franchise by a reduction of the representation of the state so doing. These provisions have not been enforced and Massachusetts refuses the franchise to illiterates, Pennsylvania to those who have not paid certain taxes, while several Southern states, by the "grandfather" clause, allow illiterate whites to vote while disfranchising illiterate blacks. The courts, in applying these amendments, have unanimously held that the right of suffrage is not one of the necessary privileges of the citizen of a state or the United States.[2] And specifically it has been declared that "the Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the state or the United States, however, from discriminating on account of race, color, or previous condition of servitude, and invests citizens with a new constitutional right which Congress may protect by legislation." Thus the question of the extension of the suffrage to women depends not upon congressional action but upon state laws unless secured by an amendment to the Constitution.

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[1] *McCready* v. *Virginia*, 94 U. S. 391, 395.

[2] *Minor* v. *Happersett*, 21 Wall. 162.

How citizenship may be gained by (1) birth and (2) naturalization

As has been seen citizenship may be gained in two ways — by birth and by naturalization. Acting upon the constitutional provision, Congress has passed laws which put the control of naturalization largely in the hands of the court. There are three stages to the proceedings. The first is a declaration of intention, which must be filed by the applicant (who must be at least eighteen years of age) at least two years before his admission as a citizen. In this declaration the alien renounces his allegiance to all foreign powers and declares his intention of becoming a citizen. The second step is to file a petition stating that the applicant has been a resident of the United States for at least five years and is not opposed to organized government, is not a polygamist, and has, not less than two nor more than seven years previously, filed his intention of becoming a citizen. This petition must be accompanied by affidavits from two citizens testifying to the residence and good moral character of the applicant. The third step, taken ninety days after the petition, is the hearing and examination by the judge. This, at some periods of our history and in some localities, has been farcical, but generally the judge satisfies himself of the truth of the statements made and of the applicant's comprehension of his declarations. When the judge is satisfied the oath is administered and a certificate of naturalization is issued. Only white persons and those of African descent are eligible. The law expressly excludes the Chinese, while by interpretation Japanese are excluded upon the ground that they are not white persons. Nevertheless children born of Chinese or Japanese parents, resident in the United States and subject to its jurisdiction, although their parents could never become citizens by naturalization, are citizens by birth.[1]

Unnaturalized aliens may vote in some states

Since the right to vote depends upon state action a state may extend that privilege to persons who have not been naturalized. An anomalous condition may exist of persons who are not citizens of either the United States or of any state taking part in the election of state and national officers. Nine states thus allow aliens who have signified their intention of becoming citizens to take part in their elections.

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[1] *United States* v. *Wong Kim Ark*, 169 U. S. 649.

Interstate comity, "full faith and credit" clause

Not merely are all the rights of citizens thus protected but certain provisions of the Constitution make the enforcement of these privileges more secure and easy. The clause in Article IV which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State" has greatly facilitated interstate relations. It has been held to apply only to civil judgments and decrees, and, while not extending the jurisdiction of the courts of one state into the territory of another, allows the judgment of the first court to be offered as evidence in the courts of another state. Such evidence is conclusive and no reexamination of the merits of the case is necessary. For example, if A obtains a judgment against B, both being subject to the jurisdiction of a court within the same state, A may use this judgment as conclusive evidence to obtain a decree from the court of another state to attach the property which B may have in that state. No new suit is necessary; all that A has to do is to offer the properly authenticated decree of the court in which the suit was first brought, and the court of the second state must execute it.[1]

Extradition

In like manner Article IV, Section ii, clause 2, provides for the surrender of persons charged with treason, felony, or other crimes, upon the demand of the authorities of the state where the crime was committed. This extradition clause has made possible the enforcement of the criminal law of the states. Yet as there is no penalty defined either in the constitutional requirement or in the congressional act which declares that "it shall be the duty of the executive authority of the state to cause the fugitive to be seized and delivered to the agent of the demanding state," it rests with the discretion of the executive of the state — the governor — to determine whether such a request shall be honored. Several cases have arisen where the governors have exercised this discretion and have refused to return fugitives, one of the most notable being the refusal of the governor of Indiana to return Governor Taylor of Kentucky, who was indicted for complicity in the murder of Governor Goebel of the state.[1] In 1918 Governor McCall of Massachusetts refused to honor a requisition from the governor of West Virginia, on the ground that the negro criminal for whom the extradition was asked would not receive a fair trial. This brought a violent protest from West Virginia, but the state was obliged to acquiesce in Governor McCall's decision.

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. I, p. 199.

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[1] W W. Willoughby, The Constitutional Law of the United States, Vol I, pp 222–224, and C A Beard, Readings in American Government and Politics, p. 148, give examples of extradition proceedings.

CHAPTER V

POLITICAL ISSUES AND PARTY HISTORY

Politics, the conscious life of the state, is the direction of the government established by the Constitution

In spite of the oft-repeated declaration that our government is one of laws and not of men, the actual operations of the government are those of men working under the Constitution. The Constitution by itself would be an interesting and instructive document setting forth political theories; it would be like any scheme for an ideal Utopia. Without the activities of men it would be cold and inert, like a steam engine without steam. It is men in their political activities who operate the government and change the Constitution from an expression of political philosophy into the charter of a going concern. Politics is the guidance of the government established by the Constitution. It is the utilization of the discretionary power confided by the Constitution to the government. Politics is the conscious life of the state. For example, the Constitution provides for the choice of a president, but no president would be chosen unless the political activity of individual citizens determined who should be chosen and performed the necessary operations prescribed by the Constitution. Again, Congress may levy taxes and appropriate money, but political activity determines what tax shall be levied and how much money shall be appropriated. All legislative and most executive action is political, and the very laws which the courts apply are the result of political activity. To decry politics, therefore, is to decry the government performing its functions.

Voters and officials try to control and direct state action

The political activities of the citizen are generally performed both outside and inside the formal government. They comprise the countless conferences and the numerous understandings and agreements, and the molding of public opinion, all of which lead towards a certain action by the government. The putting forward of a candidate, the popularization of a measure, the contribution of money, and the appeal to a Congressman are all parts of the political activity of a citizen outside of the formally established government. The veto of a president, the vote of a senator, the appointment of an officer and many of his acts, are political activities within the formal government. Briefly it may be said that the unofficial citizen attempts to choose as officials men who will direct the action of the government according to his desires. The official, as far as it lies within his power, compels the agencies of the state to act in accordance with his wishes and the desires of his supporters. The political activity of both the individual citizen and the official thus has as its aim the attempt to control the activity of the state and to produce some action.

Definition of a political party

Since a single individual has little influence by himself, he seeks cooperation. In politics this cooperation produces a political party. Professor A. D. Morse has thus rather exhaustively defined a party:

> A party is a durable organization which, in its simplest form, consists of a single group of citizens united by common principles, but, in its more complex forms, of two or more such groups held together by the weaker bond of a common policy, and which, contrary to the view usually held, has for its immediate end the advancement of the interests and the realization of the ideals, not of the people as a whole, but of the particular group or groups which it represents.[1]

Party organization

The organization of a party may be loose or strict. In its simplest form it consists of common agreements to act in a definite way. In its complex form it covers the multitude of committees and leaders, bosses and party workers, who popularize the party, propagate its ideals, and control, more or less successfully, the activities of its members. The aim of the party is to control the action of the government by possession of the offices. The purposes for which the party desires to get control of the government constitute its principles or policy. These may deal with moral, social, or economic questions, but the action of the party is political. It attempts to get possession of the government to realize its aims.

Party policy

In England, where the parliamentary system is held to work in an ideal way, the party organization and the government are

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[1] *Political Science Quarterly*, Vol. XI, p. 68.

English party organization is an instrument of government

identical.[1] This is so, because, as far as Parliament is concerned, the Cabinet is the party organization. The responsible executives, that is, the ministers, are the leaders of the party and control the party organization. The party organization is thus an instrument of the government. Therefore, not merely does complete harmony between the government and the party organization exist but by no possibility can disagreements arise, for the government and the party are one.

Parties necessary in the United States

The framers of the Constitution of the United States did not understand parties; they feared and distrusted them. Therefore they made no provision for their action in their plan of government. Yet the system they established necessitated parties. The selection of the president from a single constituency — the largest in the world, the whole country — required the action of parties to solidify public opinion and to name the candidates. The vast power in the hands of the president made his choice of supreme importance since he could determine such questions as war and peace. Declarations of policy must therefore be made as to what the party behind the candidate proposed that the government should do. And since there was a separation of departments — since no parliamentary system was possible — it was desirable that the legislature should be in harmony with the executive. To bring about this harmony in the absence of parliamentary control, party control was developed. Thus it happens that our system, designed to minimize the power of "factions," as parties were called, would fail to operate without parties.

Parties in the United States formulate policies and select officials

Yet unlike the English system there was no opportunity provided whereby a party could exercise its functions through the regular organs of the state. "There were no means provided whereby a party could formulate and carry through its policy, select its candidates for high office, or insure that they should be treated as the real leaders of the party and control its action."[2] Party organization therefore exists outside of and independently of the organs of the government in the United States. Therefore parties are, or to be more accurate were until recently, private extra-legal organizations unrecognized by law.[1] Thus it happens that in the United States parties exist chiefly for the selection of candidates, while the candidates so chosen may or may not be the leaders of the party or influential in its councils. Personal interest and party loyalty may keep the official in harmony with his party organization, but since his term of office is fixed by law no action of the party can dictate his action. Thus a president may become entirely out of sympathy with his party and, because of the vast power he possesses, may be able to force through Congress some action contrary to the desires of his party. For example, in the second administration of President Cleveland the more radical Democrats — and they were in the majority within the party — were unable to prevent the repeal of the Sherman Silver Purchase law and the measures the president took to protect the treasury. In other words, although the party may elect its candidates to direct the action of the state, there is no guarantee that the official will act in accord with his party. To put it still another way, in England absolute party government exists, while in the United States the parties have not the legal power of insuring the performance of their will.

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[1] A L. Lowell, The Government of England, Vol. I, p 458.

[2] Ibid. p. 455.

Officials may disavow their party

Since the aim of political parties is to gain possession of the organs of the government and control the action of the state, it is possible to study the party history by examining the various issues over which the parties have divided. Thus it is customary to speak of the Federalist period, the Jeffersonian period, or the struggle over slavery, and to discuss the various parties that were formed in those eras. Recently, however, a brilliant writer has attempted to explain the political issues along economic lines.[2] He holds that the numerous parties under the guise of constitutional or moral issues were attempting to control the government and direct its activities for economic purposes; that the political history of the country has been in its last analysis but a struggle between wealth in its various forms — land, commerce, manufactures, capital — and poverty. Without attempting

Economic interests affect party issues

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[1] As recently as 1912 the Republican party held that it was purely a private body whose actions were uncontrolled by the laws of the states.

[2] C. A. Beard, An Economic Interpretation of the Constitution of the United States; Economic Origins of Jeffersonian Democracy.

to follow his method too closely, it is possible in describing the great political issues to recognize that the economic element has too often been slighted and to see that even in the gravest moral or constitutional crises the claims of property have never been lost sight of.

Parties before the Revolution

Before the Revolution there were no national parties in the true sense of the word. Local parties existed in each colony. These usually were composed, on the one hand, of the office-holders and the well to do and, on the other hand, of those who were opposed to the exercise of the power of the provincial governors. Generally the latter were composed of the small farmers and those who had little property. But the franchise was so limited and the difficulties of travel so great that the possibility of effective political expression was slight. The Revolution produced a domestic upheaval. The leaders, and they were by no means all from the poorer class, were forced to call upon those less economically fortunate who had never exercised political rights. The struggles of the Confederation were largely between the poverty-stricken class and the well to do. The question of debts, mortgages, money, and the security of property were the most vital ones both politically and economically between 1783 and 1787.

Federalists (nationalists) *v.* Anti-Federalists (states' rights men) 1787–1789

It is customary to speak of political parties as originating in the convention of 1787. Certain national political tendencies were there manifested. Certain lines of cleavage there emerged. One group, and those chiefly from the small states, desired a federated government, with few restrictions upon the state governments, which were left to the control of the people. The other group, which drew its strength chiefly from the delegates of the large states, wished to form a national government so strong that it would be able to control the action of the legislatures of the states and prevent radical action which might threaten the security of property. Although a federal type of government was adopted, the national party and the property interests received ample protection. In the struggle for the adoption of the Constitution, which, as has been said, is federa in form, the nationalists took the name of the Federalists and urged its adoption, while the small states party was forced to content themselves with the name of Anti-Federalists.

Federalists organized the national government

The government was organized by those who favored the Constitution, the Federalists, but a division soon appeared. For example, Madison with Hamilton had favored the adoption of the Constitution, and down to 1789 both were Federalists. But the financial plans of Hamilton and the foreign policy of Washington were contrary to the desires of both Jefferson and Madison and their followers. Hence the first political issue under the Constitution was over what course the newly established government should take. Washington, Hamilton, and the Federalists, who controlled the offices for twelve years, utilized the powers they found and discovered new powers which might be implied from certain clauses of the Constitution — to fund and pay the national debt, to establish a national bank, and to foster the commerce and trade of the country. They professed to believe that the Constitution established not merely a national government but one superior to the states. They controlled the government; and the government, under their control, adopted financial, domestic, and foreign policies most displeasing to their opponents. This displeasure arose from a distrust both of the policies themselves and of the theories which underlay the policies. The Federalists advocated large powers for the national government so that it might establish order, preserve property, and promote new enterprises. The Democratic-Republicans, on the other hand, feared tyranny and were deeply and sentimentally attached to local liberties, and wished a government in close touch with the people and easily controlled by them. The financial schemes of Hamilton and the Federalists were designed to strengthen the national government, over which the people had less control than they had over the governments of their own states. The Democrats feared large enterprises and were distrustful of wealth other than in land. The class holding the government securities created by the Federalists would be the strong ally of the central government, which protected them and would willingly support the party which gave security to their wealth. Therefore, alike upon political theory and economic policy there was a growing solidification of the two groups.

National supremacy *v.* states' rights

Hamilton's financial policies opposed alike for political and economic reasons

The Federalists in control of the government were directing its policy contrary to the desires of the mass of the people.

Opposition party not to overthrow the government but to control it

The Republicans opposed to the Federalists distrusted their policies and hated their aims. The ill-advised attempts in the administration of Adams might have caused an explosion or a revolution and possibly a disintegration of the Union had not a political party been formed. It was one of the greatest achievements of Jefferson that he, perhaps unconsciously, opened the constitutional channels of political agitation and started a process by which the Constitution might be developed. He and his followers formed, not a revolutionary group bent upon the overthrow of the constitutional system but a national political party whose object was to gain control of the instruments of the government and utilize them according to their will. The result was remarkable. The revolutionary Jacobin clubs became party organizations. Gallatin, the spokesman of the whisky insurrectionists, became a Republican leader. Factions became political parties.[1]

Republicans condemned but used the strong powers of the government

In 1801 the Republicans gained control of the presidency and Congress and set about the realization of their aims. The Alien and Sedition laws were allowed to expire, the internal revenue laws were repealed, the army and navy were diminished. But the Republicans did not hestitate to use the large powers the Federalists had claimed for the government. The national bank was allowed to continue and was even used for party purposes, while the purchase of Louisiana made use of powers far beyond any of those employed by the Federalists. A tendency noted in other countries and in other times was quite marked in this period — a readiness to utilize powers which were denounced when employed by their opponents. These denunciations, while in opposition in many instances, were directed quite as much against the use their opponents made of the power as against the power itself.

Jeffersonian democracy v. Federalism

Nevertheless it would be a mistake to assume that the change in 1801 was a mere substitution of the "outs" for the "ins." Jefferson was a strong national Democrat — political democracy was his ideal — who advocated equal justice to all and special privilege to none. The means he advocated were to retain large powers in the hands of the states, for he believed that the states, rather than the national government as established by the Federalists, were the hope of democracy. But when the Republicans gained control of the government, when the government was in the hands of the friends of democracy, then the national government could be safely used to promote popular interests, and it was inevitable that its powers should increase at the expense of the states.[1] Then, too, there was a sharp contrast in the economic theories. Hamilton and the Federalists sought to encourage manufactures. Jefferson was a true agrarian and expressed his views as follows:

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[1] This is most suggestively stated by H. J. Ford, The Rise and Growth of American Politics, p. 126.

States' rights v Federal supremacy

> While we have land to labor, let us never wish to see our citizens occupied at a workshop or twirling a distaff. . . . Let our workshops remain in Europe. It is better to carry provisions and materials to workmen there than to bring them to the provisions and materials, and with them their manners and principles. . . . The mobs of great cities add just so much to the support of pure government as sores do to the strength of the human body.[2]

Agrarianism v industrialism

The triumph of the Republican party meant that the government was now in the possession of the school opposed to the capitalistic class, which had obtained the Constitution with all its safeguards for property. It did not involve any fundamental alterations in the Constitution nor did it propose any more immediate control of the government by the people. It did mean, economically, the possession of the government "by the agrarian masses led by an aristocracy of slave-owning planters, and the theoretical repudiation of the right to use the Government for the benefit of any capitalistic groups, fiscal, banking, or manufacturing." [3]

Personal politics, 1812–1832

From the close of the War of 1812 until 1832 there was nominally but one national party, and with the election of Monroe in 1816 the "Era of Good Feeling" set in. Yet there was anything but good feeling between the different political groups. It was rather an era of personal politics, when the struggle of the different leaders attracted more attention than the policies they sought to dictate. The election of Adams in 1824 did much to solidify parties, and by 1828 divisions along the lines of public policies began to appear.

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[1] See J. A. Woodburn, Political Parties and Party Problems in the United States, pp. 26–27.

[2] H. J. Ford, The Rise and Growth of American Politics, p 104, Writings of Thomas Jefferson (P L Ford, ed.), Vol IV, p 480; see also C. A. Beard, Economic Origins of Jeffersonian Democracy, chap. xiv.

[3] C. A. Beard, Economic Origins of Jeffersonian Democracy, p. 467.

Party divisions reappear

These divisions were formed upon both an economic and a democratic basis. The rapid growth of the West was producing a society where substantial equality existed and where almost absolute democracy found free play. In the East great numbers of immigrants had settled in newly formed manufacturing centers, and, although during the first quarter of the century the property qualification prevented their taking part in the government, by 1825 the relaxation of these tests made the industrial class a force to be reckoned with. Like the frontiersmen they held democratic ideas and willingly followed leaders who promised popular control of the government. The industrial revolution in England and the invention of the cotton gin increased the demand for cotton. This changed the agricultural system of the South. Slavery was changed from a domestic-plantation system to a capitalistic institution. Demand for slaves and demand for more slave territory became political issues. The West again needed money to develop, which the capitalists of the East supplied. To avoid this dependence the Western states advocated a relaxation of the banking laws so that state banks could furnish cheap and easy money with which their obligations might be met.

Western democracy

Immigration and manhood suffrage

South and West *v.* East

Jacksonian democracy

In 1828 these various elements united upon Jackson. He had the popularity of a successful military hero; he was a Westerner, thoroughly democratic in nature and habit; and, above all, he was a strong nationalist. From 1828 until 1860 the Jacksonian party was successful in electing its candidates at every election, with two exceptions — in 1840 and 1848 the Whigs nominated "military heroes," and triumphed. Under the Democratic party the institutions of the state came more under popular control than even in the Jeffersonian period. Rotation in office and the spoils system seemed firmly fastened upon the government. The banking system established by the Federalists and continued by Jefferson was destroyed, and dubious experiments in finance were tried. Yet Jackson was a strong upholder of the unity and strength of the government, as the nullifiers in South Carolina found to their cost.

Jacksonian party v. Whigs and states' rights men

The party in opposition found it difficult to formulate principles. It included the manufacturers and capitalists of the East, who were irrevocably opposed to wildcat banks and who desired higher and higher tariff duties to protect their industries, and far-reaching internal improvements. Webster and Clay may be taken as typical leaders of this group. Another element in this opposition party was composed of those who would restrict the activities of the central government — states' rights men, who approved of nullification. With elements so opposed it was difficult to obtain sufficient unanimity to produce a party. In addition the question of slavery was growing more and more insistent, and the Whigs' attempts to settle it by compromise were foredoomed to failure. It was the slavery question in its various forms — expansion of slave territory, fugitive-slave laws, slavery in the territories, squatter sovereignty, and abolition — that wrecked the Whig party and changed the Democratic party for a time into a sectional party, and finally produced the Republican party.

Whigs wrecked by slavery question

Origin of the Republican party

Of the various issues which led to the emergence of the Republican party the question of abolition was first in time and in importance. The establishment of *The Liberator* by William Lloyd Garrison in 1831 marks the beginning of the agitation. So violent were the methods of the abolitionists that although their societies multiplied they attracted little political following. Other forces were needed to popularize the movement and to give it a firm political foundation. One of these was found in the demand for an increase of slave territory. The controversies over the annexation of Texas, the Mexican War, and the question of the disposition of the territory acquired presented problems less of a moral and more of a political nature. In 1848 the Free Soil party nominated candidates upon a platform which might be acceptable to those whom the violence of the abolitionists repulsed. It declared that slavery should be barred from national territory by national power; that there should be no more slave states; that interstate and coastwise slave trade

Abolition movement

Free Soil party

should be forbidden. This platform was attractive from its conservative nature. The objects sought for could be achieved by political parties acting within the Constitution and without attempting to overthrow the government.

Compromise of 1850

The time, however, was not yet ripe for a complete destruction of the Whigs and the establishment of a new political party. The compromise of 1850, engineered by that skillful Whig leader, Henry Clay, temporarily halted the movement, and both the Whigs and Democrats hoped that the troublesome question was finally settled. But the act of 1854, repealing the Missouri Compromise, soon undeceived them. The doctrines of nonintervention applied by Douglas to the Missouri Compromise startled both parties. The Southern Democrats seized it as making the extension of slave territory possible. The Northern Whigs regarded it as attacking the great Compromise which had made their party possible. Furthermore, the Northern Democrats, by no means anxious to see slavery extended, while alienated from the party, were not ready to join the Whigs with their doctrines of high protection and vast internal improvements.

Kansas-Nebraska Act

Stephen Douglas and popular sovereignty

Republican platform of 1860

In 1856 the Republican party was formed. The platform was skillfully framed. The issue of slavery was squarely met, and it was asserted, contrary to the dictum of the Supreme Court in the Dred Scott case, that Congress could exclude slavery from federal territory. Slavery existed only by state law. On the question of the tariff ample protection for American industries was promised. To attract the nonmanufacturing vote a new homestead law was pledged with a generous policy of disposal of public lands. In 1860 the Republicans were successful and Lincoln was elected.

Civil War increased federal power and made the Republican party conservative

The result of the election was secession and civil war, and the Republican party, from being merely the antislavery party, became the party pledged to support the Union, and, indeed, took for a time the name of the Unionist party. The cost of the war caused the increase of taxation in all directions, but especially in the tariff, so that from being a party pledged to a mild form of protection of American industries, the Republicans became strongly protectionist. The issuance of bonds and the establishment of the national banking system all tended to make it the party of the capitalists. The war itself and the problems connected with reconstruction brought about the extension of the functions of the national government at the expense of the states. In its economic aims and its governmental theories it was the legitimate successor of the Federalists under Hamilton, although its policies were carried further than Hamilton had ever dared to dream.

Disintegration of the Democratic party during the war

During the war the Democrats were split. In the South they favored slavery and led the secession movement. In the North there were three groups: the war Democrats, who loyally supported the war as a war for the preservation of the Union; a middle section, by far the most numerous, who regarded the war as brought on alike by the "fanatics" of the North and the "fire-eaters" of the South, who resisted the war as a war for emancipation, and who looked to conciliation as the means of saving the Union; finally, the "Copperheads," out-and-out opponents of Lincoln, and bent on making the prosecution of the war as difficult as possible. The measures adopted by the Republicans during the reconstruction period made a union of these three wings possible, so that by 1875 the Democrats obtained a majority in the House and claimed that in 1876 their candidate, Tilden, was cheated out of the presidency by the action of the electoral commission in seating Hayes.

Revival of Democratic party

Republicans and Democrats divide on the tariff

The period between 1876 and 1896 has been well described by Professor Beard in the phrase "The Growth of Dissent."[1] During this period the old party issues of slavery and reconstruction disappeared and a series of new issues came to the front. Nominally the tariff most markedly divided the parties. The Republicans, more and more the party of high protection, succeeded in writing their ideas into law in 1890 and 1897. The Democrats, on the other hand, while repudiating the title of "Free Traders" bestowed upon them by their opponents, had by 1888 become the party pledged to the reduction of duties to a revenue basis. The only tariff law they succeeded in passing, the Wilson law of 1894, departed so far from this principle that President Cleveland allowed it to become a law without his signature.

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[1] See especially C. A. Beard, Contemporary American History; F. E. Haynes, Third Party Movements since the Civil War.

Evasion of issues by great parties caused rise of minor parties

Although the two great parties attempted to concentrate public attention upon the tariff, other and more vital issues were being constantly discussed and urged. These dealt with economic, industrial, and social questions. The fact that the old parties were divided upon these issues and avoided making clear-cut declarations upon them caused the organization of minor parties.

(1) Greenback party: cheap money

One of the questions growing out of the Civil War was the disposition of the United States notes, or "greenbacks," as they were popularly called. During the war $450,000,000 had been issued, which had received the legal-tender character by act of Congress. An act of 1866 had authorized their retirement and cancellation, and by 1867 their amount had been reduced to about $350,000,000, when the opposition succeeded in checking further retirement. The theories which underlay this opposition were but repetitions of the old arguments for expansion of the circulating medium, which had been urged at different times since the colonies were founded. Greenbacks were retired and the obligations were converted into bonds, thereby increasing the interest charges on the national debt, which led to increased taxation. At the same time the amount of circulating medium was reduced. As a result coin increased in value and prices fell. To this perfectly natural operation of an economic law was added the panic of 1873 and the subsequent hard times. The debtor class suffered, while the class holding obligations paying a fixed income received relatively much more. As a result the friends of expansion, or the Greenbackers, prevented further retirement, provided that notes once paid into the treasury should be reissued, and passed a bill providing for their further increase. This bill was vetoed by President Grant in 1874. The Greenbackers differed from the old parties not only on the question of the United States notes but on other economic and social questions. Thus, in 1880, which marked their high-water mark, their candidate having received more than three hundred thousand votes, they advocated labor legislation of an advanced type, regulation of interstate commerce for the benefit of the shipper, and Chinese exclusion. After 1884 the party ceased to exist as a national party, and the greater part of its principles in one form or another were adopted by the newly formed People's party.

(2) Silver party: bimetallism or the gold standard

Closely akin to the financial ideas held by the Greenbackers were those of the Silver party. In 1792 silver and gold were both freely coined at the ratio of fifteen to one, which proved too low for gold, and consequently little was offered. In 1834 the ratio was altered to sixteen to one, which proved an overvaluation for gold, so that no silver was offered; and by 1873 the silver dollars had almost ceased to circulate. In that year Congress demonetized silver and made gold the basis of the monetary system. The result was a still further decline in the price of silver and an increasing demand on the part of the silver-mine owners that the government should coin silver at the old rate. This demand was reenforced by the debtor class and the farmers, who demanded money cheap and plenty with which to meet their obligations and who violently denounced the advantage that a hard, sound, and contracted currency gave to the bondholders. It was the same question which the Greenbackers had raised in another form — the question of the expansion of the currency for the benefit of the debtor class in order that prices might rise and enable them to pay their obligations with greater ease. Both parties were divided upon this issue. In 1878 the Bland-Allison Act provided that the Secretary of the Treasury should buy not less than two million nor more than four million dollars' worth of silver a month to be coined into silver dollars. In 1890 the Sherman act altered this to a requirement of purchasing 4,500,000 ounces of silver a month and of issuing silver certificates redeemable in gold or silver at the discretion of the Secretary of the Treasury. Since the market rate of silver was about twenty-seven to one as compared with gold, this was a pure expansion measure for the debtor class and the mine owners. Moreover, as the government, since 1879, had been redeeming all its obligations in gold, these certificates and silver dollars, together with the United States notes, constituted what President Cleveland called "an endless chain," which rapidly depleted the supply of gold in the treasury. As a result President Cleveland was forced to sell bonds, and in 1893 obtained the

[Crime of 1873]

[Bland-Allison Act]

[Sherman Silver Purchase Act]

[Its repeal]

repeal of the Sherman law. The issue, however, was not settled, and bimetallism, or free silver, constituted one of the burning questions in the campaign of 1896.

(3) Labor parties after the Civil War

In 1865 a national labor congress was held, and movements toward the organization of labor were begun in the older and more industrial regions of the country. In 1870 political parties known as Labor Reform parties nominated candidates for governor in Massachusetts and New Hampshire. In 1872 a national convention was held at Columbus and a candidate for the presidency was nominated, who polled only twenty-nine thousand votes. The platform, among other things, declared in favor of restricting the sale of public land to bona-fide home seekers, Chinese exclusion, an eight-hour day for government employees, regulation of railroad and telegraph rates, and the subordination of the military to the civil authorities. This early attempt to form a political party out of labor failed, and the reformers were absorbed by the Greenbackers, who made more extensive and liberal declarations in favor of labor. In 1888 two labor factions nominated presidential candidates, but between them polled only fifty thousand votes.

(4) Socialist Labor party

In 1892 the Socialist Labor party was organized, which continues to nominate candidates but has never polled a large number of votes — the maximum being reached in 1900, when its candidates received more than thirty-nine thousand. This party is the most advanced of all parties, and perhaps because of its very radicalism it has failed to unite the working class against the owners of property.

(5) Socialist party

The Socialist party first nominated candidates in 1900. This party, although appealing to labor, was far less radical than the Socialist Labor party. Indeed, its platform of 1908, advocating graduated inheritance and income taxes, universal suffrage, the initiative and referendum, a federal department of labor, popular election of judges, and compulsory insurance for workingmen contained few principles which now would be called socialistic. This party has at times polled an enormous vote for a minority party. Beginning with over ninety thousand votes in 1900, it obtained more than four hundred thousand in 1908 and eight hundred thousand in 1912. But although it has succeeded in electing an occasional representative to Congress, it has been almost negligible in presidential campaigns, since it draws its strength from both parties.

(6) People's, or Populist, party

Just as the Greenbackers had championed the rights of the farmers, so in the eighties the People's, or Populist, party was organized for the same purpose. Farming seemingly was an unprofitable business, ". . . wheat sells at from 40 to 50 cents, oats at from 9 to 12, and corn at from 10 to 13 cents a bushel, and fat cattle at from 1½ to 3 cents a pound."[1] It was impossible for the farmers to make a living. In addition to the difficulty of making a bare living the necessity of meeting the interest charges upon the mortgages or the rent of the farms was always present.[2] Three reasons were given by the farmers for their condition : transportation, land, money.[3]

Agrarian conditions

Railroads and politics

The national government had given lavish aid to the railroads and had stimulated their construction, and the railroads had been active not merely in national but in state politics. This activity of itself would not have excited opposition if other grievances had not been held against the railroads. It was felt that much of the farmer's profit was eaten up in freight charges, which were exorbitantly high. It was common knowledge that the roads were giving rebates, free transportation, and other discriminations to aid certain industries or to prevent the growth of others. Individuals or even whole communities suffered under the power of the railroads. The farmers, forgetting that the railroads were performing great social and economic services, felt that either through national or state action their rights should be protected and the power of the roads curtailed.

Demand for government control of railroads

Land monopoly

The land question involved both the lavish grants which the government had made to the railroads and the land which speculators held unimproved to sell at a profit. These lands the farmers thought should be thrown open for settlement.

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[1] Gladden, "The Embattled Farmers," in the *Forum*, Vol. X, p. 315; F. E. Haynes, Third Party Movements since the Civil War, pp 221–222.

[2] In Kansas, in 1890, out of 3000 farmers only 350 owned their land clear of encumbrances, while 1030 occupied rented farms and 1727 held farms under mortgage. — F. E. Haynes, Third Party Movements since the Civil War, p 222

[3] J. A. Woodburn, Political Parties and Party Problems in the United States, pp. 111 et seq.

Financial theories

Regarding money the People's party held the same doctrines as the Greenbackers — the quantitative theory. Since prices were falling while interest and rent charges remained the same, an increased supply of money would raise the prices and enable the farmers to meet their obligations with greater ease.

Patrons of Husbandry

In the sixties the Patrons of Husbandry had been organized to alleviate some of the conditions which were similar to those in the eighties, and the society had achieved a moderate amount of success as far as state action alone could remedy them. The Greenback party, however, had attracted this discontented element to itself as far as national politics were concerned. With the disintegration of the Greenbackers in 1884 the Unionist party was organized and polled nearly one hundred and fifty thousand votes in 1888. But the real organ of agrarian discontent was the People's party, or the Populists. This was the outgrowth of the National Farmers' Alliance and Industrial Union, which originated in Texas in 1875, and of the National Farmers' Alliance of Illinois, which was founded in 1880. These societies developed rapidly during the eighties and by 1890 claimed a membership of more than three million members. At first the Alliance professed to be nonpolitical, but to attain its ends it entered state politics and captured the Democratic organizations in many of the Western states, while in the South the Democratic organization adopted its doctrines.

Farmers' Alliances form the Populist party

Populist platform of 1892

In 1892 a nominating convention was held at Omaha, and the most radical platform ever put forward by an American party was adopted. Concerning money, the free and unlimited coinage of silver at the ratio of sixteen to one was advocated, in addition to the emission of paper United States notes to take the place of the national bank notes founded upon securities, until the circulating medium of the country should equal fifty dollars per capita. A graduated income tax was urged to force the holders of great wealth to contribute more than their proportional share to the expenses of the government. All land held by railroads in excess of their actual needs and all land held by aliens was to be reclaimed by the government.[1] As a result of the campaign of 1892 there were over a million votes cast for the presidential candidates of the party, giving them twenty-two electoral votes, while the party was represented in Congress by three senators and eleven representatives.

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[1] J A. Woodburn, Political Parties and Party Problems in the United States, pp. 116–117.

THE CAMPAIGN OF 1896

Split in the Democratic party platform of 1896:

(1) against capital

(2) against protection

(3) for free silver

(4) for income tax

(5) against injunctions

It was the culmination of these various movements that makes this campaign so important. From 1893 to 1897 President Cleveland, representing the conservative Eastern wing of the Democratic party, had alienated the radical sections of the South and West. When the convention met at Chicago the radicals were in control and forced the adoption of a platform not merely radical in tone but everywhere filled with class feeling. The "Crime of 1873" in the demonetization of silver was held responsible for the fall of prices, the increase of debts, public and private, and the enrichment of the moneyed class. The McKinley tariff was called a prolific breeder of trusts. On the money question the platform declared for the free and unlimited coinage of silver at the ratio of sixteen to one without waiting for the aid or consent of any nation. A scarcely veiled attack was made upon the Supreme Court by the declaration that it was the duty of Congress to obtain the reversal of the decision declaring the income tax unconstitutional. The use of injunctions by the federal courts was unsparingly denounced. The convention chose as its candidates William Jennings Bryan, a young man who had served two terms in Congress and who had thrilled the convention with his oratory, and Arthur Sewall of Maine, a rich shipbuilder and ironmaster. The People's party accepted Bryan as their candidate for president, but nominated Thomas E. Watson of Georgia for vice president. These candidates by no means obtained the full party vote, for the Democrats attached to sound-money principles held a dissenting convention and nominated candidates who obtained more than one hundred thousand votes. In addition many Democrats bolted the ticket and voted for the candidates of other parties.

The Republican convention was under the control of the conservatives. It chose as its candidate William McKinley of Ohio,

Conservative platform of the Republicans

who was known as a bimetallist, but whose chief claim to fame rested upon a highly protective tariff which bore his name. The adoption of the platform was not accomplished without dissent; Senator Teller with thirty-four saddened delegates who favored silver seceded from the convention. The money planks, which, it was asserted, were adopted somewhat against McKinley's wish, opposed free coinage of silver except by international agreement and favored keeping all forms of currency at a parity with gold. On other points the platform was colorless.

The campaign of 1896

Although the Republican leaders had hoped to focus public attention upon the tariff the position of the Democrats forced the monetary issue to the front. Furthermore, the radical nature of the Democratic platform and its frank appeal to class feeling tended to divide the parties rather sharply along class lines. The Republicans were fortunate both in their leader and his manager, Marcus A. Hanna, and by appeals to the conservative instincts and threats of unemployment in case of Democratic success, together with a use of money more lavish than ever imagined possible in previous campaigns, carried the day. McKinley polled more than seven million popular votes and won two hundred and seventy-one electoral votes, while Bryan obtained six and one-half million popular votes and only one hundred and seventy-six electoral votes. Even had the popular vote of all the minority parties been added to the Democratic vote the Republicans would still have had a plurality of about three hundred thousand. The victory as far as the presidential election was concerned was decisive. In Congress, moreover, the Republicans apparently had a safe majority, although one by no means united on the money question.

Issues not settled by 1896 but postponed by war with Spain

Although the conservatives had triumphed, the large popular vote cast for the Democratic and Populist candidates showed that new issues were entering into political life. Their discussion was postponed by the war with Spain and the consequent problems of expansion and imperialism. These questions, coupled with the attempted revival of the silver question, were the chief issues in the campaign of 1900. The Republicans, although divided upon imperialism, emphasized the tariff and sound money and won the election by even a larger plurality than before.

THE GROWTH OF DISSENT

Demand for government control of "big business"

The period since 1896 most markedly differs from the earlier periods of the political life of the country in two respects: large economic interests, or "big business," have very frankly attempted to control the government. This attempt has been met by a counter attempt to control business, first by the ordinary constitutional legislative methods, but finally by attempted alterations in the system of government.

Prosperity and trusts

From 1896 to 1907 the country was very prosperous. Trade expanded, partly as a result of the policy of imperialism, and manufacturing more than kept pace with trade. The salient characteristic of business was the organization of huge corporations. These in some instances followed the plan of the Standard Oil Trust of the eighties, by which the stock of the competing companies was turned over to trustees to manage and the profits paid pro rata to the original holders. More often, however, the organization was effected, as in the case of the United States Steel Corporation, by out-and-out purchase. In either case competition was stifled, less prosperous concerns were forced to the wall, and partial monopolies resulted. Moreover, in these consolidations large amounts of stock were issued for which there was no actual capital investment. These huge amounts of stocks formed a tempting field for speculators. Similar consolidations were followed in the railroads, and in the attempts to pay dividends upon the watered stock the rates were raised to exorbitant figures. Finally, business meddled in politics, not merely for the general good but for special favors, and too often gained them by corrupt means.

Demands for railroad regulation

The demand for the regulation of the railroads had originated in the Granger movement, had been espoused by the Greenbackers, and had been partially solved by the establishment of the Interstate Commerce Commission in 1887. The supposed powers of the commission were greatly curtailed by the decisions of the courts. Prohibition of monopoly was attempted by the Sherman Anti-Trust Law of 1890, which declared illegal every combination in restraint of foreign or interstate commerce. Little conscientious effort was made to enforce either law until the

The Interstate Commerce Commission and Sherman Anti-Trust Law

second Roosevelt administration. During this period the Interstate Commerce law was amended by the Hepburn Act of 1906 and was extended to telegraph and telephone companies, pipe lines, express companies, sleeping-car companies, bridges, ferries, and railway terminals; and during this administration numerous prosecutions of large combinations were instituted under the Anti-Trust law. These failed to satisfy altogether the demands of a constantly growing element in both parties.

Failure to get relief by legislation leads to demands for alteration of the political parties and amendment to the Constitution

It was hoped that the election of 1900 would end the possibility of serious threat from the radicals who composed the Populist party; indeed, in the national legislature the party had only four senators and nine representatives. By 1904 the organizations of the old parties were firmly controlled by leaders who had little sympathy with such ideas. Failing to get satisfaction from either of the great parties, and from bitter experience doubting the legislatures of the states, schemes were proposed to shake the control of the party organizations and give to the people a more direct participation in the government. These measures group themselves around the initiative, referendum, and recall, but also include the movements for direct primaries in place of the nominating conventions, the control by law of the party organizations, and the limitation of the use and the sources of money in political campaigns. In addition the Constitution was altered directly by the amendment providing for the direct election of United States senators. Most alarming of all, the power of the courts to declare statutes unconstitutional was attacked. This arose from the fact that many of the laws passed by the legislatures of the states to remedy social or economic conditions were declared unconstitutional by the state courts or the Supreme Court of the United States. To prevent this the device of the recall of judges or the recall of judicial decisions was invented, and the former was adopted by several states. Most of these movements had their origin in the agricultural regions of the West and spread eastward, thoroughly alarming the conservative politicians.

Administration of Taft and revolt in Republican party

The administration of President Taft (1909–1913) failed to satisfy the discontented elements. The tariff was revised but not substantially lowered, as was hoped. Many anti-trust prosecutions against corporations were successfully concluded and much good legislation was passed. But the Republican party was divided. A radical, or progressive, element was demanding the solution of the issues just described, in a manner not acceptable to the more conservative leaders. President Taft himself, although liberal in particular laws, was resolutely opposed to the adoption of any of the constitutional changes looking towards a more direct democracy. In 1911 the second Congress of his administration was Democratic, thus showing the popular trend of public opinion.

Preelection campaign of 1912 leads to formation of "Bull Moose," or Progressive, party

The campaign of 1912 is interesting in many respects. For the first time the device of the direct primary was tried in many states. By this the people expressed their preference directly in the choice of delegates to the nominating convention, and these were pledged to one candidate or another. In the Republican party Mr. Roosevelt and Mr. Taft contested the nomination, and although Roosevelt obtained a majority of the delegates chosen in the primaries, Taft more than held his own in the states where the delegates were chosen by conventions, and in addition he continued to hold the national committee and the organization of the party. The convention nominated Taft, and Roosevelt and his supporters seceded and formed a Progressive party. Under his lead the Progressive party made a remarkable showing, gaining more than four million votes, nearly a million more than the Republicans, and obtaining eighty-eight votes in the electoral college to the Republicans' eight. The Democrats, however, obtained more than six million votes and four hundred and thirty-five electoral votes. Another interesting phenomenon was that in spite of the fact that both the Democratic and Progressive parties put forth platforms distinctly socialistic and attractive to the radicals, the Socialist party more than doubled its vote, although it failed to carry any state.

Democratic success

Wilson and "The New Freedom"

The Democrats nominated Governor Wilson of New Jersey on a platform which advocated tariff for revenue only, dissolution of trusts and criminal prosecution of the officers, and additional legislation to make it impossible for private monopoly to exist in the United States. In his campaign Wilson outlined his economic theories, which he maintained would establish "The New Freedom." Business, no matter how large, was not to be disturbed as long as it was not guilty of unfair practices.

Wilson's first administration

Trusts, however, had been guilty of unfair practices and, since they were the attempt not to face but to avoid competition, were to be destroyed. The legislation he succeeded in passing during his first term carried out his ideas and provided for a trade commission to supervise interstate business, while the Anti-Trust act was amended to define and prohibit unfair practices. Indeed, during his first administration more measures of prime importance were passed than during any other equal period; the tariff was revised, the Federal Reserve banking system established, the Interstate Commerce Law amended, the Federal Trade Commission established, and the Anti-Trust law amended. Many of these measures were satisfactory to the disaffected of both parties, and he was reelected, although by a greatly reduced majority.

Economic legislation

Foreign affairs

The last half of Wilson's first administration was complicated by the European war. He succeeded in preserving absolute neutrality, while at the same time bringing to his point of view the public opinion of the different sections of the country. He was bitterly criticized because he neither intervened nor hastened measures for preparedness, but when it became necessary for the United States to enter the war he brought a practically united country behind him. Although the Republicans found countless flaws in the details of his policies, his general aims were everywhere approved. He succeeded in attaching the radical and labor element to his policies by fair treatment or, according to the Republicans, by surrendering to them. Abroad, both among the Allies and even in Austria and Germany, he was looked upon as one of the most authoritative leaders in the war.

Wilson's second administration —first half

Wilson's second administration was sharply divided by the signing of the armistice, November 11, 1918. During the first half of his administration the Democrats controlled both branches of Congress, and the plans of the administration were adopted with little difficulty, sometimes almost unanimously. Indeed, for a time it seemed as if there was truth in the popular phrase "Politics has adjourned." The war plans of the administration involved a greater extension of the federal power than was ever experienced before. The railroads were taken over by the government, the price of wheat was guaranteed to the producer, the sale of wheat, sugar, and other commodities necessary

Extension of federal control

for food and industry was controlled by federal licenses, and all industry and finance felt the power of the government. The War Labor Board attempted, with considerable success, to prevent strikes and lockouts and to keep the essential industries operating at full capacity. In so doing organized labor was recognized as never before and was deferred to in the determination of wages and conditions of employment. In the conduct of foreign affairs and the negotiations which led to the cessation of hostilities President Wilson offended the Senate by not taking them into his confidence but by standing upon his strict constitutional prerogatives.

Wilson's second administration—second half

With the end of the war, conditions were suddenly changed. The Republicans controlled both Houses of Congress, and the coming of peace put an end to the necessity of seeming unanimity. Both domestic and foreign problems were pressing for settlement, and the relations between the President and Congress were strained. The Senate bitterly resented its exclusion from any share in the negotiations for the peace treaty and viewed with hostile eyes the proposed League of Nations, as well as many of the settlements made by the treaty. Domestic problems arising from the inevitable reconstruction-after-war conditions were pressing for solution. Chief among these was the question of the high cost of living and the consequent necessary wage adjustments and the question of the return of the railroads to the stockholders. Although there was little unemployment, and industry was prospering in every field, there was a feeling of discontent and uncertainty owing to the high prices and the proposal that labor should have an increasing voice in the control of industry.

Peace treaty

Domestic problems

CHAPTER VI

PARTY ORGANIZATIONS

Purpose of party organization to obtain control of the government by the election of officers necessitates:

The purpose of party organization is to control the government. This control is exercised by obtaining possession of the offices. The primary aim, therefore, of a party is to elect its members to office. But the election is only the third and last duty of a party, and in some regions where one party has the overwhelming majority it is the least troublesome duty. Before the election must come the selection of the candidate who shall be the choice of the party. This selection is nomination. After the nomination has been made the candidate must make his appeal to the voters; he must state for what he stands; he must be popular enough to attract votes. This is called the campaign. It is possible therefore to consider the purpose of the party organization under three divisions, — nomination, campaign, and election. Another duty may precede even the nomination. This is the declaration of principles, or, as it is called, the framing of the platform. At times this becomes very important; but more often in national affairs the platforms attempt to avoid controversial subjects and to restate in well-sounding phrases the past position of the party. Furthermore, the candidates, when nominated, may ignore the platform and stress other principles or even make a new declaration of political faith on an entirely new issue. In state affairs the platforms are of less importance and generally contain little more than a fervid indorsement of the platforms of the national parties.

(1) Nomination

(2) Declaration of principles

Why there are no state parties

Although the Constitution leaves large spheres of action to the state, there have never been any important state parties for any long duration. Local issues have sometimes caused the formation of a temporary organization, which has altered the balance of the parties within the state. In some even less frequent instances these temporary organizations have succeeded in gaining control of the state government, but this is exceptional. More often they seek to have their issues adopted by one of the regularly organized parties and to accomplish their aims through that party. In some instances when an issue has affected several states the national parties have adopted it in their platforms. Generally, however, as the study of minor parties has shown, a purely local party or one framed upon a single issue has little chance of obtaining any very wide support and still less chance for success.

Party system national

The party system in the United States originated over national issues and developed national parties. Theoretically and logically these national parties have only a remote connection with the political issues in the states and even less with those in the smaller political divisions. Experience and efficiency as well as political expediency and practical convenience have demonstrated the mutual advantage of the closest possible union between the two. Thus a city government, being almost at the mercy of the state legislature, finds its way far more smooth if the party in power in the city is the same as that of the majority in the legislature. Formerly, when the senators were chosen by the state legislatures, the national parties saw that they must control the state legislatures in order to obtain a majority in the Senate. Since the adoption of the Seventeenth Amendment, by which the senators are elected by popular vote, this necessity has lessened, but one of practical political convenience has arisen. It is easier, simpler, and far more efficient to utilize an already existing and well-working organization than to extemporize one every six years.

Connection between national party organizations and local issues

Party system federal in organization

The organization of the party system in the United States is federal like the government. At the top are the permanent national-party organizations for the purpose of electing the president. In each state there are the state organizations which cooperate in the election of the president, but which are constantly concerned in the carrying of the state for the party. In each congressional district there may be a district organization which works with the national and state organizations to elect representatives, while in the counties, cities, towns, and wards there are still smaller organizations, all of which seek primarily to elect officers belonging to their national party and which, at state, congressional, senatorial, and national elections, are found working for the candidates of their party. The whole party organization may be compared to a series of wheels all geared together, the national organization revolving in a four-year cycle and each of the others in its own cycle, as determined by the frequency of elections.

Nomination

The selection of the party candidate is the most important step in the political cycle, and the development of the nominating procedure has had an interesting history.[1] In colonial days, and to a less extent after the formation of the national government, the candidates were sometimes self-nominated. In a letter printed in the newspapers the would-be candidate announced himself and, over his own signature, asked for the support of his fellows. More often, however, a group of the candidate's friends put his name forward. This informal gathering of party leaders is the germ from which the whole complex party organization developed, and, indeed, in spite of the law and the legally established methods is still utilized and is often able to override or control the more formal procedure.

The caucus

From these small conferences the caucus developed. In Boston, in 1763, the caucus met secretly "at certain times in the garret of Tom Dawes,"[2] and its members were admitted only after close scrutiny. At these meetings it was decided for what candidates the influence of the caucus should be exerted, and committees were appointed to solicit votes.[3]

Other clubs for similar purposes were held in different parts of Boston, and this method of nomination with slight variations spread through New England. Outside of New England similar meetings were held, not always secret, which were called primaries. As the Revolution approached, the self-constituted committees of correspondence used their influence to nominate "honest men" to the colonial assemblies, but after the war these committees were disbanded. Nominations for local offices in towns and cities were made by the caucus, but this method proved increasingly unsatisfactory as the population increased, and became impossible in larger territorial districts. To meet this need county or district conventions were held composed of delegates chosen by voters in the wards or towns. This convention system for county officers and representatives to Congress developed almost contemporaneously in Pennsylvania and Massachusetts about 1800.

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[1] For a full treatment of this subject see F. W. Dallinger, Nominations for Elective Office.

[2] John Adams, Works (ed 1850), Vol II, p 144.

[3] The following votes of the Boston caucus given in Wells, Life of Samuel Adams, Vol. I, p. 471, illustrate the procedure.

"Voted, That this body will use their influence that Thomas Cushing, Samuel Adams, John Hancock, and William Phillips be Representatives for the year ensuing.

"Voted — That Gibbons Sharp, Nathaniel Barber &C. . . be a committee to distribute votes for these gentlemen." — Quoted by Dallinger, p. 10

The convention

The Congressional caucus

The organization of the federal government made the election of national officers necessary. The methods of the colonial caucus were insufficient for the nomination of a candidate to be elected by thirteen states. For the first two elections Washington was by common consent the sole candidate for the presidency, but the scattering votes of the electors showed that there was no unanimity for the vice presidency. Not until 1800 was there any formal method adopted, and then meetings of the party members in Congress were held. This was known as the legislative caucus, and was followed until 1824; from Congress it spread to the states. In neither national nor state politics did it meet with unchallenged satisfaction.

Criticism of the Congressional caucus

As early as 1800 one writer denounced the caucus as follows:

> If anything will arouse the freemen of America, it must be the arrogance of a number of members of Congress to assemble as an electioneering caucus to control the citizens in their rights. . . . Under what authority did these men pretend to dictate their nomination. . . . Do we send members to Congress to cabal once in four years for President? . . . After Congress have accomplished their legislative business have they a right to dictate in the choice of the executive? If so, what an imposition upon the "people" to talk about the freedom of election, or what consequence is it that the state legislature should concern themselves in the mode of choosing electors. . . .[1]

Nevertheless the caucus was continued from 1800 until 1824. Several reasons explain this. From 1820 to 1824 the Federalist party was disorganized, while in the Republican party there was little opposition to the Virginia dynasty, — Jefferson, Madison, Monroe. In 1816, however, the caucus very nearly nominated William H. Crawford, a man whom the people at large had never thought of for the presidency. The possibility of such an accident aroused the members of both parties, and although Monroe received the caucus nomination and was elected in 1816 and 1820, it was a distinct handicap to his candidacy that, in 1824, Crawford was the choice of a small caucus.[1]

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[1] Benjamin Austin, Constitutional Republicanism as opposed to Fallacious Federalism, pp. 87, 88, quoted by Dallinger, p. 16.

Nomination by state legislatures

After the decline of the caucus, state legislatures began to nominate candidates. This was accomplished either by the legislature acting in its official capacity by the passage of joint resolutions or by a caucus of the party members of both Houses. In either case the attempt was made to put before the country a candidate supported by a local section of the party and to spread its action among the states. This method, originating in the nomination of Jackson by the Tennessee legislature in 1822, was continued until 1832, when the convention system was adopted.[2]

State nominating conventions

One other method of nomination was tried before the system of national nominating conventions was finally developed. This was nomination by a state convention. It has been pointed out that for districts larger than the town and city the local caucus proved unsatisfactory and that, about 1800, the use of county conventions for the nomination of county officials and congressmen was adopted. In 1828 the state-convention idea was applied to the presidential candidates, and Jackson and Calhoun were formally nominated by a Pennsylvania convention. This use of state conventions has continued to the present day; not, however, to nominate the candidates, but to instruct the delegates and (before the days of the direct primary) to choose them, and finally to indorse the candidates chosen by the national convention.

Of the various methods of nomination for either local or state offices, that of the nominating convention has aroused the least opposition and proved the most satisfactory. In 1831 it was adopted by the Anti-Masonic party, and in 1832 conventions for both Democratic and National Republican parties were held. From that day to the present there has been little change in procedure, and substantially the same methods are followed by all parties, whether national or local. Indeed, the convention as a means of obtaining a candidate satisfactory to the party is distinctly an American invention and one of the strongest links in the party organization.

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[1] Out of two hundred and sixteen Republican members only sixty-six attended.

[2] F. W. Dallinger, Nominations for Elective Office, p. 31, finds evidence that nomination by the legislature was used spasmodically in three states as late as 1844.

National nominating conventions, 1832

The national nominating conventions are the supreme organs of the parties. While in session they are supreme not merely in choosing candidates and in framing platforms but in determining rules for party conduct. But their active life lasts at most less than a week every four years, and parties could not exist if their sole organizations were confined to such brief and infrequent manifestations of authority. The real, effective organizations are the party committees. These range in importance from the national committees, charged with the conduct of the presidential campaign, down to the ward committees in the cities.

National party organizations.

(1) The convention

(2) The committees

Technically and legally there are only two sets of committees charged with the election of federal officers — the national committees, which conduct the presidential campaigns, and the congressional committees, which attempt to obtain as large a representation as possible in Congress. Since, however, there are no state parties as such, the members of the national parties within the states form organizations to perform the necessary party functions for the government of the states. National and state parties are generally the same and bear the same names, but national and state party organizations are separate and distinct and perform different functions. Yet since both sets of organizations are working upon the same set of individuals for the same end, — the success of the party — both sets of organizations are dependent upon each other. Legally and actually the national and state committees are independent of each other; practically they work in harmony, and within their spheres of activity the state committees perform functions necessary for the success of the national committees. Just as every citizen lives under a dual government and is both a citizen of the

Relation of the national and the state organizations of the party

United States and of the state in which he resides, so a man is a member of both a national party organized for the election of president, senators, and representatives, and of the national party organized within his state for the election of state and local officials.

The national committee:

Nominally the national committee is chosen by the convention. Actually each delegation, state or territorial, nominates one member, and the convention ratifies this choice. The national committee is the head of all party organizations. Its activities begin with the close of the national convention and continue until the adjournment of the succeeding convention. The cycle of these activities may be said to begin with the choice of the place to hold the coming convention. Next, a call for the convention is issued by the committee. This is of great importance, as it determines the number of delegates allotted to each state and prescribes the method by which they shall be chosen. Perhaps the most important of all the committee's duties is the making of the temporary roll of delegates entitled to seats in the convention, thereby, as the experience of the Republican convention of 1912 showed, determining the choice of the candidate. At the close of the convention the committee assumes the conduct of the campaign with all its perplexing details.

Choice

Duties

Duties of national committeemen between campaigns

At the close of the campaign the national committee apparently disappears from public attention, but its activities by no means cease. Each member of the committee is supposed to keep himself ready to respond to calls for activity. He acts as a peacemaker in cases of dispute and dissension; he constantly tests the party loyalty and enthusiasm in his state. In cases where two factions have developed, his influence is sometimes decisive in determining the victorious side. He serves as the medium by which the president and Congress are kept informed of the opinion of the rank and file of the party. If his party has no representatives in Congress he is the channel through which the patronage is distributed; and not infrequently his influence is more potent and he is more often consulted than the senators and congressmen of his party. In highly organized states, where the organization may be called the machine, he is often the leader or boss. In some instances a national committeeman has been known to combine several positions and functions; he is a member of the national committee, the controlling influence in the organization of the national party for state politics, and he may also have himself elected to some federal office. Such combinations were made, for example, in New York in the case of Senator Platt, and in Ohio in the case of Senator Hanna.

Power and influence of national committee

Since the national committee holds over from one convention to the end of the next succeeding, the committeemen are sometimes able to perpetuate their own existence. Their names are generally found among the delegates chosen for the next convention and usually among those of the delegates at large. They are influential in the state conventions which are called to nominate the delegates at large, and they have been known to use their influence to secure the election of the proper district delegates. If the committee has been victorious in the campaign, they are in close touch with the administration, and with the help of the president they can frequently determine the next nominee. In this they are helped by their power to make the temporary organization of the convention, for this organization usually votes itself the permanent organization and so perpetuates the influence of the committee which summoned it into being.

Congressional committees:

The only other organizations of the parties are the congressional committees. These date in the Republican party from the struggle between Johnson and Congress. The national committee was naturally in close touch with the administration which Congress was denouncing. In order to free itself from this control and to further the election of congressmen hostile to the administration, the Republicans of both Houses met in caucus, and the party representatives from each state and territory named one member. Where the state was not represented in Congress it had no member, and where a state had only one representative he became the member of the committee. In the Democratic party a slightly different method is followed. The Democratic members of the Senate choose nine members of the committee, and members of the House choose one for each state represented. In case there is no representative in either body, some preëminent party man from the unrepresented state is chosen.

Composition differs in parties

Operation of congressional committees

There is also a difference in the method of operation between the committees of the two parties. The Republican committee concentrates its attention upon the doubtful states and attempts to increase the party representation in Congress. The Democratic committee, on the other hand, keeps in close touch with the national committee and attempts to assist in the popularization and propagation of the doctrines of the party in all parts of the country.

Work of congressional committees

In presidential years the congressional committees seem of little importance. They subordinate themselves to the national committees on the one side and to the state committees on the other. In the elections in the middle of the term of the president the committee is somewhat more active. Through publication it attempts to precipitate public opinion and to meet new issues unconsidered in the national platforms. Through speakers and contributions it aids in the campaigns in the doubtful states.

Party machinery may be servant or master of voters

The organization of a party consists of the institutions — conventions, committees, caucuses, primaries, and party officials — through which it is attempted to carry out the will of the members of the party and to obtain possession of the government to put into effect the principles or policies of the party. Such organizations may be loose or close, strict or weak. They may seldom suffer change in personnel or they may be frequently changed, but as long as they are responsive to the wishes of the majority of the party and attempt to get control of the government in the interests of the party, they are legitimate party organizations. When, however, the party officials, leaders, or officeholders utilize their position to control the party (and through it, the government) for private ends, whether their own or those of some interest, the organization becomes the machine and the leader the boss. Machines are always apparently intensely partisan and constantly appeal to party loyalty, while in reality they may be bipartisan in essence and ready to trade votes to gain their private ends.

The organization or the machine. The boss

State party organization varies as the state is safe or doubtful

Roughly, the organization of the parties within the states varies in proportion as the state is safe, — that is, where one party generally gains the advantage; or doubtful, where the parties are about evenly balanced. In safe states, however, there are several varieties of party organization. In some sure states, like Pennsylvania, the continued dominance of one party has produced a machine, with its boss, which controls alike the party organization and the government and crushes all opposition. At the other extreme, in states like Vermont and Iowa, although the machine is not unknown, the party majority is generally composed of faithful voters who support the party conscientiously. Party attachment and superior numbers, rather than party organization, secure the party control. In this category might be placed the Southern states where, however, the race question, rather than purely political issues, gives the Democratic party its control. An apparent exception to both types is Massachusetts, which is regarded usually as a fairly safe Republican state. In this state, however, individual leadership and independence in voting have made it impossible for either party organization to develop a machine and have forced both parties to keep up effective organizations.

Exception

Organizations in doubtful states rarely machines

In doubtful states the organizations of both parties are alert and active and perform the normal and proper functions of party organizations. Machines and bosses are seldom possible, as too much interest is taken by the voters, and the organization of either party is ready to expose the sins of the other and to take advantage of errors. An apparent exception is found in New York. There are found, first, a large Democratic city with a class of voters most susceptible to machine leadership and control and, second, a large Republican majority outside the city. In both city and state politics the possible rewards for corrupt party action are greater than in any other state; hence the possibility of machine organization and boss rule is greater than elsewhere.

Exception, New York

Organs of state party organizations

In all states the actual organs of the party organization are the same and are modeled upon the national organs. There are state conventions at which the state officers are nominated and the party officials chosen. Outside of New England the county is the next unit, with its convention and its party committee. In New England the county conventions are more or less perfunctory affairs, and the active unit below the state is the city or town. For each of these there are party organizations and committees. Besides these there may be conventions for the nomination of congressmen, state representatives, and state senators, each choosing its own committee to conduct the campaign. But the most important organizations of the hierarchy are the state and the local organizations, whether county or city.

Republican organization in Pennsylvania, a safe state

Pennsylvania may be taken as an example of a state organization carried to the extreme and controlled by a machine which is directed by a boss. The Republican state convention is composed of delegates from the state legislative districts, one delegate being allowed for each two thousand votes cast for the Republican candidates at the last presidential election. Thus the political leaders of the cities which cast the largest vote acquire great influence. The state committee is chosen from the state senatorial districts and consists of over one hundred members. The chairman, who is chosen not by the convention nor by the committee itself, but by the chairman of the convention and the candidates nominated at the convention, is empowered to name twelve members at large. This committee is thus so large that it cannot act as a body, and its functions are generally performed by the chairman and a small group of his trusted lieutenants. These functions consist primarily in the election of the candidates nominated at the convention. Quite as important from the point of view of the chairman is the need of keeping the organization under his control and of dominating the various county conventions. These county conventions are apparently independent of the state committee and present varieties of form and procedure. They have, however, one characteristic in common. The committees are all so large, some being as large as the state committee, that corporate action is impossible, and the power is exercised by the chairmen. These chairmen are controlled by the chairman of the state committee, and both county and state organizations respond to his direction. Pennsylvania is unique in that, since the foundation of the Republican party, the state organization has been dominated by United States senators. Practically all the federal patronage is distributed through the senatorial leader, and he has been able to convert what on the face seems a most efficient organization into what is regarded by many as a perfect machine. With the exception of 1912 it has never failed to deliver a large Republican majority and the electoral vote of the state.

Democratic organization in a doubtful state

Tammany Hall

The most famous local party organization is the Democratic organization of New York County known as Tammany Hall. The central power of the organization is the county committee composed of one member to every twenty-five Democratic voters. This apportionment, which gives a huge committee of over eight thousand, is defended on various grounds. Theoretically it is the most perfectly democratic organization in the world, as it gives representation to every little group of Democratic voters. From the point of view of the party, it insures the activity of a large number of party workers. Financially it gives the party a comfortable revenue of $80,000, as each member pays an annual assessment of ten dollars. From the point of view of the machine, the size of the committee precludes any general action and makes certain the control of a small group of leaders. This group is the executive committee, which is composed of the leaders of the thirty-five assembly districts in New York County. Theoretically the leader is chosen by the voters of his district; actually this is not so. The would-be leader makes up his slate, that is, a ticket headed by his own name and containing the names of as many of his supporters as his district is entitled to, according to the ratio of one to every twenty-five votes. Should this ticket be elected, he is known as the executive member and is generally elected by the convention a member of the executive committee. A rule, however, requires that a new member can be elected to the executive committee only with the approval of the retiring committee. If this approval is not given, the committee may elect someone else, thus giving the committee the power to perpetuate itself. For the purpose of making county nominations, conventions are held composed of delegates chosen from each district, but these conventions do little more than ratify the decisions of the executive committee. In fact, the executive committee controls the party in the city and, when that party is in power, the government of the city and county. Owing to the influence of the social organization known as Tammany Hall, its officials and leaders dominate the executive committee and, when the party is successful in elections, have been known to control the appointment of the city officials, the action of the mayor and of the city government, and thus have gained for themselves and their supporters not merely the legitimate rewards of place but the illegitimate perquisites known as graft. The operations between 1863 and 1871, when both Tammany Hall and the party organization were dominated by the Tweed Ring, are notorious. This concentration of power and misuse of the party organization for private ends has at times made Tammany Hall one of the best examples of a machine organization.[1]

The work of the organization

It has been said that the purpose of a political party is to secure possession of the government by the election of its candidates. Theoretically, therefore, the purpose of the organization of a party should be to carry the election for the party. The problem is not so simple nor are the functions of the organization confined to that single object. As has been pointed out, the first step in the campaign is the selection of the candidates of the party. It is here that the organization begins its work, and it is here that the work of the organization is most effectively done. It is here, moreover, that the operations of the organization are most sharply distinguished from those of the machine.

Selection of candidates

Distinction between the work of the organization and the work of the machine

Every machine, and to a less extent some organizations, seeks to control the action of the members of the party. In the case of a machine this control is sought so that the strength of the party may be utilized for private ends. The true boss must be able "to deliver the goods"; that is, to control the action of the representatives and executive officers. Generally this is accomplished by the nomination of "safe" candidates; that is, strong partisans of the organization or machine. Thus it sometimes happens that a boss and the machine are willing to forego complete victory in order to retain the control of the machinery of the party. The reasons for this self-denial are twofold. Elections come frequently, and the defeat of one year may be compensated by the success of the next. Appeals to party loyalty can be effectively used where the action of the opponents can be freely criticized. Often the change of comparatively few votes will be sufficient to swing the balance. But the control of a party organization is often the result of years of secret work and, once lost, is more difficult to regain. Moreover, since the boss utilizes the party for private ends, it may be possible to obtain partial satisfaction of some of these by sacrificing victory at the election in return for favors from the majority and for continued control of the organization. Thus, it is sometimes asserted that in doubtful states the machine is really bipartisan, using the name of the majority party but operating through groups in both parties. Particularly is this characteristic of machine methods in state legislatures and municipalities.[1]

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[1] See D. B. Eaton, Government of Municipalities, chaps. iv–vi; James Bryce, The American Commonwealth (rev. ed., 1914), p. lxxxviii.

Machines may be bipartisan

Registration

To insure that only those are allowed to vote who have the right, most states require some system of registration of voters. It is at this point that the work of the organization of the party as distinguished from the party itself begins. The organization, by means of committees in every district or ward, attempts to see that every voter likely to support the party is properly enrolled on the official registration lists. This duty frequently involves the use of party workers, either voluntary or paid. At this point, formerly, some of the most effective work of the machine began. Voters were "colonized" in crowded districts; that is, registered under false addresses. Sometimes they were bodily transferred from a safe to a doubtful district with only a few days' residence, and sometimes they were registered and voted in doubtful districts without even this quasi-compliance with the law. The advantage to the machine was obvious. It gave the machine a group of voters, more or less dependable, on which it could count at the primaries for its own perpetuation and the nomination of its candidates, as well as a body of voters pledged or hired to support the nominations at the election. In those states which require annual registration or registration before each election the organization is compelled to make urgent appeals to the party members not to neglect to register, while the machine uses the appeal to the self-interest and the self-preservation of its workers and sees to it that its supporters are properly registered.

Where the organization or machine begins its most effective work

The primaries — definitions

Primaries, or caucuses, are meetings of the party members to determine the candidates of the party, the delegates to the next higher party convention, and the party officials. Originally they were extra-legal meetings, unregulated by statute, and laws unto themselves. As such they furnished fertile soil for the growth and operation of the machine, and even party organizations did not hesitate to use them in a manner hardly compatible with the ideal purposes of party instruments. In localities where the machine was highly organized, it controlled absolutely the primary. Only those were allowed to vote who had been formally admitted. "Snap" primaries, or meetings called on short notice, were held; or the work of the primary was hurried through in the presence of but a fraction of the party members. Sometimes, although the notice of the primary might be given, the proceedings were dispensed with and the local leader made returns satisfactory to himself. When these means failed "strong-arm methods" were employed. Nonmachine members were driven away by force, small-sized riots were started, and the ballot box was filled with paper votes, or the official returns were "satisfactorily" altered. In any instance the will of the machine was registered whether it was the desire of the party or not.[1]

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[1] P. S. Reinsch, American Legislatures and Legislative Methods, pp. 241 et seq.

Corrupt operation by powerful machine

Members of the organization most active in parties

Where the machine was less powerful the organization could usually count upon the apathy of most of the members of the party and on the activity of its stanch supporters. Those favorable to the organization would come to the primaries; those indifferent would not. In the case of a struggle within the party, nonparty members might be induced to vote for the ticket of the organization to the discomfiture of the more independent members of the party.

State laws controlling parties

To remedy these evils and if possible to restore the control of the party to its members most of the states have adopted statutes subjecting the primaries to the operation of law. The first step is to define what political associations are subject to state regulation. One of two definitions is generally followed:

Definition of a party

A party is a political organization whose candidates polled a fixed number of votes at the preceding election;[2] or, and more frequently, a party is an organization whose candidates obtained a fixed percentage of the total vote cast at the preceding election.[1] Organizations falling within these definitions are subject to laws concerning primary elections, and, on the other hand, such associations have the privilege of placing their candidates on the ticket under the party designation. Thus the choice at the primaries gives the right to the use of the party emblem and the party name, while the dissatisfied elements within a party must seek other means for nominating their candidates, and names and designations other than those of the regular party.

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[1] M. Ostrogorski, Democracy and the Organization of Political Parties, Vol. II, pp. 207–213.

[2] In New York this number is ten thousand.

After having defined a party, the next problem is to provide a test by which party membership may be determined. This is of great importance, for as the preamble to the Oregon law asserts:

Necessity of determining party membership

> It is as great a wrong to the people as well as to the members of a political party, for anyone who is not known to be one of its members to vote or take part in any election or the proceedings of such a political party, as for one who is not a qualified and registered elector to vote at any state election or to take part in the business of the state.

The difficulty is to find some test which at once preserves the independence of the voter and safeguards the party from the assault of nonmembers. States vary at different times in their desire to accomplish first one and then the other of these objects. For example, the method followed by Wisconsin since 1903 established what is known as the open primary, as distinct from the closed primary, at which some test or preliminary registration is required. From 1916 to 1917 Massachusetts adopted the open primary, at which nominees of all parties were arranged in party columns and the voters of all parties received the same ballot and voted for whom they pleased, provided that their votes were all cast for candidates in a single party-column. It must be noticed, however, that it is scarcely a primary at all, if a primary be defined as the action of the members of a party. It is rather a preliminary election at which the members of all parties participate.

The open primary

The closed primary is the one most widely used. Here the test of party affiliation is determined in various ways. In the

The closed primary

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[1] In Iowa 2 per cent of the vote cast for governor; in Oregon 25 per cent of the vote cast for the candidate for Congress.

South it is generally left to the discretion of party officials. In New York declarations of party affiliation are made at the time of registration, from which, after the election, the party lists are made up. Other states require a personal declaration from the voter at the time of the primary, which if challenged must be supported by an oath that he has not taken part in the primaries of other parties within a certain time and that he intends to support, at the coming election, the candidates chosen at the primary. Still another variation requires the voter to register his preference by asking for the ballot of a particular party. His request automatically registers him as a member of that party and debars him from taking part in the primary of another party unless he, a certain time before the primaries, registers his change of party affiliation. In varying degrees these regulations guard the integrity of the party but discourage independent voting and, from the fact that the party affiliations of the voters are matters of public record, make the work of the organization easier.

Tests of party membership

State control of conduct of primaries

State law has furthermore regulated the conduct of the primaries. It has determined, within certain limits, the hours at which the primaries must be open; it has regulated the form of the ballots, which in some states are printed at public expense; it has provided that the names of the nominees shall be placed on the ballots as the result of petitions signed by a varying number of voters; it has also required that the results of the primary shall be entered upon official blanks and that the ballots shall be kept in sealed boxes for a certain time, pending the demand for a recount. Finally, it has provided that all expense shall be borne by the community which bears the expense of the election.

Functions of primaries:

(1) Select candidates for office

(2) Select officials for party organizations

Primaries, however, are more than party meetings to nominate candidates for office. They are meetings for the selection of the officials of the party organizations. In precincts and wards and generally in cities the primaries have long been used for the purpose of choosing the members of the party committees. In larger political divisions the convention has generally been the place of choice. But as has been seen the convention was believed to be the field which the boss most firmly controlled. In the attempt to weaken this control and to democratize the party organization, the selection of the county and state committees in many states has been taken from the convention and given to the primaries. Theoretically, this should give the voters actual and complete control and make the machine impossible. Actually, because of the apathy of the voters and the activity of the workers of the organization, the change has not accomplished all that was hoped for. The third duty of the primaries is to choose delegates to some higher party organization which is intrusted with the nomination of the party candidates, or, in the case of the nomination of the president, with the selection of delegates to the national nominating convention. The names of these delegates, in the old days when the primary was unregulated by law, were put upon the primary ballot by the party committee or the boss of the district. Now they find their place there generally as the result of petition. In either case through the carelessness of the voters and the lack of independence of the delegates, the organization usually controls the convention.

(3) Select delegates to some higher party organizations

As has been pointed out, the use of state and county conventions for the purpose of making nominations antedated the use of national conventions. However, the development of this instrument and its subjection to the control of the machine did not take place until the last quarter of the nineteenth century. In those years the convention showed alike all the excellences and evils such a system was capable of.

State and county conventions:

A party convention is composed of delegates chosen by some lower and smaller party assembly. The choice of delegates was formerly often made at the primary, which the boss or the organization usually managed to control. This control was made easier by the very number of delegates which the voters were asked to choose. Delegates for city conventions were rarely chosen; delegates for county conventions were always chosen outside of New England; delegates for state conventions, for state senatorial conventions, for state legislative district conventions, for congressional conventions, and sometimes for conventions to fill even more minor offices were often chosen. Unless some crisis was impending the party committee for the district in which the primary was held was almost unhampered in the choice of names put upon the ballot. Once upon the ballot there was rarely any contest, and the " slate," as the choice

(1) Controlled by the organizations

(2) Controlled through naming the "slate," or list of delegates

(3) Controlled through referring contests to committee of organization, then to committee on credentials, then to convention

of the organization was called, was ratified. Roughly, three classes of delegates were favored by the organization: compliant party members who would support the organization and follow the advice of the party leaders would make up the majority. Men of more independence and weight were chosen but their influence was neutralized by the character of the rest of the delegation. Sometimes excellent delegates were solemnly elected who by no possibility could attend the convention, and their credentials were given to compliant party workers. Not infrequently when the machine failed to obtain from the primary the delegates desired, another set was chosen and furnished with credentials, and both delegations appeared before the convention, each claiming to be legally chosen from the district. Such contests were referred to the state or county committee, which made up the temporary roll, then to the committee on credentials, which reflected the will of the majority upon the temporary roll, and finally to the convention itself. In each of these steps the influence of the party committee which summoned the convention and made up the temporary roll was all-powerful. Once the convention was organized to satisfy the organization, there was little likelihood of effective opposition. Still less was there much possibility of the convention thwarting the will of the boss, when a machine controlled the party committee and boldly unseated the opposing delegates and seated its own adherents.

Opportunity for corrupt manipulation in state and county conventions

The operations and procedure of state and county conventions are quite analogous to those of the national conventions to be described. One exception must be noted. State conventions attract less public attention than the national conventions, and minor local conventions still less. Hence, in the absence of public scrutiny the delegates may be "manipulated" and subjected to improper influences. The credentials of members unable to attend may be acquired, and instances are known where they were offered for sale to prospective candidates. Promises of office where offices are so numerous and so relatively unimportant may be made with less danger and more likelihood of fulfillment. Private interests operate more freely and openly than at national conventions.

Committees self-perpetuating

Aside from the choice of candidates and the framing of the platform the conventions formerly chose the members of the state and county committees. If the convention is organized by the committee and responsive to its wishes the choice of the committee for the next campaign is generally but a perpetuation of the term of the old committee. The circle is thus completed. The committee creates the convention and the convention re-creates the committee.

The direct primary.

In order to remedy the abuses shown in the convention system, and to weaken the influence of the organization and to break the power of the machine, the device of the direct primary was introduced in the early years of the twentieth century. It spread rapidly and was utilized in some one of its various forms in almost every state in the Union.[1]

Definition and functions

Briefly, the direct primary consists of the nomination of candidates directly by the party members without the intervention of a delegate convention. Applied to the nomination of the president, it means that the district delegates are chosen in primaries held in the districts, while the delegates at large are no longer chosen by the state conventions but by the voters at the same primaries which choose the district delegates. Since for presidential nominations the would-be delegates frequently indicate the candidate they are willing to support, the primaries become a test of the popularity of the presidential aspirants and tend to weaken the influence and importance of the national conventions. Moreover, the varying laws of the different states come into conflict with the rules of the parties for the choice of delegates.

Advantages claimed for the direct primary

(1) Destruction of machine

(2) Larger vote

(3) More attention to choice of candidate

Aside from the claim that the direct primary will destroy the influence of the machine and the improper influence of economic interests, — a claim by no means always to be substantiated by the facts, — the supporters of the institution find other benefits. It is asserted with truth that the primaries held for the direct nomination of the candidates bring out a larger vote than those held for the choice of delegates. From this it is argued that the voters are giving greater attention to the choice of the candidate instead of reserving their attention and interest to the

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[1] See American Year Book (1917), p. 49.

(4) Popular control of committees

election of the officer. Since, moreover, in many states the members of the committees are chosen directly, it gives the voters an opportunity to express their preference and to prevent the organization from becoming self-perpetuating. Finally, it is asserted, although the assertion is difficult to substantiate, that better men are chosen as the result of the direct participation of the intelligent members of the party. If the members of the party showed active and intelligent interest, the assertion might be more capable of demonstration, but since, save in crises, the supporters of the organization form the majority of the voters at the primary, the control which the nonorganization members exercise is potential rather than actual.

(5) Nomination of better men as candidates

Disadvantages:

The direct primary is attended with certain disadvantages which even the supporters of the system recognize. The vote at the primary is decisive and allows for no compromise. In the ideal working convention the supporters of the different candidates present their claims and, after canvassing the situation, the convention, guided by the various opinions expressed either publicly or privately by the delegates, selects the man best fitted to be the candidate of the party. Argument and persuasion precede conviction. The direct primary registers, in theory, the decision of the voter as influenced by the arguments of the various candidates; actually it is more often the result of some popular or demagogic appeal. The choice of the direct primary, moreover, may result in the nomination of a candidate by the minority of the party. When many names are put upon the ballot, each drawing numerous supporters, the party strength is dissipated and the candidate receiving the largest vote may fall far short of obtaining the majority of the votes of the party and even may fail to get a majority of the votes cast at the primary. Various devices have been suggested to prevent this, but the fact remains that the successful candidate of a multitude may not be the one most satisfactory to the voter. Finally, the item of expense deters some men of moderate means, since to make himself known to the voters the candidate is forced to conduct two campaigns. In spite of these serious defects no state which has once adopted the direct primary has returned to the convention method of nomination.

(1) Lack of discussion

(2) Chance for demagogues

(3) Possibility of choice by minority

(4) Expense to candidates

The campaign

The third and last duty of the organization is the election of its candidates. This is attempted by the campaign. A campaign may be defined as an organized effort to influence voters throughout the district voting upon the candidates. Thus, in the last analysis, there are campaigns for cities, counties, congressional districts, states, and the nation. But since, in many instances, the campaigns for several and sometimes for all of the officers come at the same time and the names of all the candidates are upon the same ballot, a single campaign for the success of the whole party ticket is carried on. All campaigns, whether for local, state, or national officers, have many characteristics in common, although they differ greatly in methods and in degree of activity.

The work of the national committee

The most salient and striking similarity is the activity of the organized committees. In the presidential campaign the national committee works at feverish speed. Headquarters are opened in New York, and usually branch headquarters in Chicago. The chairman, the treasurer, and the members of the executive committee assume the direction of the wide general features of the campaign and impress their ideas upon the other members or other organizations by frequent and almost continuous conferences. These conferences are held either at the headquarters or in various localities where the presence of an influential executive officer is required. Thus it happens that the chairman of the national committee, both from his position at headquarters and from his frequent and continuous journeyings throughout the country, becomes a well-known figure, of importance not only in the national organization but in the state organizations as well.

Work of the national and state committees in sure states

When the state elections coincide with the national elections the state committees work in harmony with the national committee, and are sometimes practically supplanted by it. A difference, however, must be noted between the activities of the national committee in sure and in doubtful states. Sure states, where the result of the contest is practically certain, receive little attention from the national committee. The member of the committee from the state may report upon conditions and ask for a share of the funds or speakers or campaign literature, but the amount he receives depends upon the estimated closeness of the vote. When victory or defeat is certain little effort is spent in attempting to obtain an overwhelming majority or in combating hopeless defeat. In these states the state committee assumes active control and direction, raises its own funds, and is responsible for the result. Where, however, the issue is doubtful a very different policy is pursued. The very fact that headquarters are located in New York shows the anxiety with which that state with its large electoral vote is regarded. In such states the national committee may practically control and supersede the state committee. The national committeeman from the state is in frequent and almost constant touch with the chairman and leaders of the committee. His judgment is received with great respect and generally followed. In case, however, of factional dissension within the party in the state this dependence is not always shown. The committeeman naturally advances the interest of his own faction which sometimes, even with the backing of the national committee, fails to control the majority of the party.[1] Although the activities of the national committee in doubtful states overshadow those of the state committee both in intensity and in magnitude, yet the state committee by no means ceases its work. Some, and often much, of the money spent by the national committee is distributed through the medium of the state committee. Moreover, the state committee itself raises sometimes large sums for the purpose of insuring its control over the state officials.[2]

Work of the national and state committees in doubtful states

Relation of national and state campaigns

But whether the state be sure or doubtful, whether the national committee be active or inactive within it, the state and national campaigns are inseparable. The presidential candidate who carries the state usually sweeps into office the state officials of his party.[3] The national party is furthermore deeply interested in the success of the party candidates for senators and representatives. To carry out its policies effectively the successful party must control not merely the presidency but Congress as well. Hence the congressional committees of both parties devote whatever energy and resources they may have to securing the election of their candidates to Congress. This is most noticeable in "off years" when the elections for senators and representatives are the only ones held. In presidential years the senatorial campaign is directed by the state committee, and some assistance may be given to the campaigns of representatives. Nominally, however, the state committee is most interested in the success of the party candidates for governor and the control of the state legislature, and to this end it devotes its energies, although not its undivided attention. Since the national committeeman is influential in the state committee, if not either officially or tacitly its leader, and since in the final resort he has the control of the greater resources, his views are listened to with interest and his suggestions generally obeyed. So closely interwoven are the interests of both the national and state organizations of the party that it is hard to determine where one begins and the other leaves off. Harmony, coöperation, and coordination are characteristic of their relations.

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[1] An excellent example of this was seen in the conditions in California in 1916 when Hiram Johnson was elected United States senator as a Republican, although Wilson as the Democratic nominee carried the state.

[2] Thus Mr. Roosevelt persuaded several rich men in New York to underwrite the campaign in that state in 1908. He asserted with truth that he had not asked money for the presidential campaign but for the state Republican committee.

[3] Exceptions are numerous, but, taking the country as a whole, this is true.

Coöperation of smaller committees

The county and city committees also cooperate with the national committees. Primarily their interests lie in the election of the local officers and their efforts are expended in that endeavor. Nevertheless, considerable connection is maintained with the higher committees. A portion of the campaign funds may be assigned to assist in and help out a local contest. Speakers and printed material may be sent to a district on request of the local committee, and in some instances the active work of the campaign within the city may be carried out largely by the state or national committee. Generally, however, the theory is held that although the national or state party is strengthened by local successes the management of the local campaign is left to its own committee.

Campaign methods:

A political campaign is an organized effort to arouse the interest and enthusiasm of the party members and to attract the independent voters to the support of the party candidates. The methods by which this is accomplished vary with time and locality, but there are common features found in different degrees in all campaigns. These may be classified as the work in registration and the canvass of the voters; informing the voters concerning the issues involved and the personality of the candidates; and the attempt to arouse enthusiasm and passion in order to produce results on election day.

(1) Registration

The campaign may be said never to end as far as the work of the organization with regard to registration is concerned. In every voting district a member of the organization attempts to see that every newcomer has his name on the registration lists. In those states which require registration for every election this work must be performed almost every year for the entire electorate. In other states the work is less laborious and is confined to getting the names of newcomers upon the list and to seeing that none has been dropped incorrectly. As each party attempts to register as many votes as possible the door is opened for improper and fraudulent registration. Therefore, to prevent this, the organization in large cities employs both paid and volunteer workers and even detectives to examine the list and to prevent the addition of false names and the omission of correct ones.

(2) Canvass

Closely connected with the registration is the canvass of the party strength. It is assumed that some member of the organization knows with considerable accuracy the party strength within his district. In highly organized districts this can frequently be forecast within a few votes. In less highly organized districts the party members report the general drift of sentiment to the leaders. In the Republican party in Pennsylvania, where the organization is highly efficient, it has happened that "during a heated campaign, every tenth or even every fifth man in the party is given an official position. He becomes a party watcher, whose especial duty it is to learn the exact political opinions and intentions of the few voters assigned to his observation."[1] Sometimes this canvass is carried on with businesslike efficiency, and card catalogues are made showing the loyalty and opinions of the voters and the persons likely to influence. Whatever the method, the canvass is of great value in determining the subsequent course of the campaign. If a safe party majority is shown, the organization is relieved from the necessity of an expensive campaign. On the other hand, if the canvass shows dissension and a tendency towards independent voting, a larger proportion of the resources of the organization must be used to secure a satisfactory victory. In close campaigns a second canvass may be conducted in order to show what success has attended the work of the organization, and the necessity of renewed effort. Registration is always conducted by the state or local committees, while the canvass is generally also their work, although in doubtful states the national committees may assist with funds.

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[1] Jesse Macy, Party Organization and Machinery, p. 121.

(3) Printed appeals

All parties have at different times heralded the fact that this was to be a campaign of "education." It may be doubted, however, whether documents, newspaper articles, and speeches make any very great appeal to the intellect of the voters. They do convey much information, generally correct, though one-sided; they do present well-reasoned arguments based, however, upon rather prejudiced evidence. Nevertheless, this method of campaign does make more of an appeal to the reason of the voter than the speeches, clubs, and processions, which are frank appeals to the emotions. These so-called appeals to reason are in the form of printed matter. They include documents and speeches and are issued in great profusion. In one day in the 1900 campaign the Republican shipping room sent out three and a quarter tons of documents and received four million copies of a single speech; while the Democrats issued over eight million copies of Bryan's letter of acceptance.[1] These documents are generally sent out in bundles to the state committee, which passes them on to the local committees, which in their turn are supposed to distribute them. This is not always done, however, and the waste is very great. A second appeal is made by the newspapers. In 1900 the Republican Press Bureau at Chicago employed five experts to write articles to be inserted in the newspapers. Many county weeklies received "patent insides"; over two hundred were provided with stereotyped matter; while proof slips were mailed to the more important papers. It was estimated that two thousand papers had no other political news or discussion than what was sent them, and that four thousand published articles and editorials regularly.[2]

[Campaigns of education]

[Documents]

[Newspapers]

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[1] *Review of Reviews*, Vol. XXII (1900), pp. 559, 560.

[2] Ibid p. 551.

Posters and advertisements]

Posters are printed and distributed in great numbers;[1] advertisements are inserted in the daily and weekly papers and in the magazines. In fact, in recent years, the use of advertising has probably increased in greater proportion than almost any other branch of the printed appeals.

4) Official state campaign textbooks

Several states, following the example of Oregon,[2] issue under the state authority textbooks containing the necessary information for the voters, together with appeals for support of candidates and party measures. Every candidate must pay for at least one page and may buy more. Parties are allowed a certain amount of space in which to make appeals, and those favoring or opposing the measures placed on the ballot by the initiative or referendum may state their arguments. In Oregon these pamphlets are printed at the expense of the state, and one is mailed eight days before the primaries and another ten days before the election.

(5) Political meetings for enthusiasm rather than discussion

The emotional part of the campaign is now chiefly confined to meetings — "rallies," as they are called. These rallies, which are open to anyone interested, are attended mostly by the members of the party, and their purpose is rather to confirm the strength of the wavering and to arouse the enthusiasm of the faithful than to convert opponents. The rallies vary all the way from a great mass meeting, held in a large center and addressed by presidential candidates and orators of national distinction, down through the meetings in smaller cities, towns, and villages. In addition to these more formally planned meetings, there are the "cart-tail" or "soap-box" speakers, who appear almost nightly in the districts of large cities. In 1900 over six hundred speakers were managed from the Republican headquarters in Chicago, and the New York headquarters had several hundred additional orators.[3] State committees also employ speakers and arrange meetings.

(6) Processions

Processions and parades are still utilized as a means of making a demonstration, but the picturesque torchlight procession has apparently lost popularity. In its place rather solemn processions of substantial citizens march in broad daylight when they may be seen and their influence felt. Another method of rousing enthusiasm is by the party club. In some instances these clubs are permanent affairs, with clubhouses or rooms which are maintained throughout the year. The more general type, however, is the campaign club, organized sometime during the summer preceding the election. Rooms are rented or meetings are held in halls, speakers are listened to, songs are sung, and sometimes refreshments are served. In large cities these political clubs may be under the patronage of some local leader, who meets a portion of the expense and utilizes the enthusiasm generated for his own advancement as well as that of the party. Instances are not wanting where the members of a club have obtained their support by a species of blackmail levied upon the merchants as well as upon the candidates.

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[1] In 1900 the Republicans put out over half a million of a single poster.

[2] Oregon, Indiana, North Dakota, Wyoming. — P. O. Ray, An Introduction to Political Parties and Practical Politics, pp. 199–200

[3] *Review of Reviews*, Vol. XXII (1900), p. 553.

(7) **Clubs**

Campaigns expensive

Political campaigns are expensive. Writing in 1910, Mr. Herbert Parsons, chairman of the Republican county committee of the county of New York, asserted that the committee needed $208,200 to conduct a campaign in that single county. This was, it must be remembered, an "off year," when the enthusiasm of a presidential election was not operative, and also when the extraordinary expenses attendant upon such a campaign were not necessary. This sum, however, did not include the money spent by the state committee in the district.[1] For presidential campaigns vastly greater sums are collected. The maximum was probably reached in 1896, when it is believed that the Republican national committee controlled over seven million dollars.[2] From that huge sum there has been a rapid and steady decline. The Republican fund of 1900 was about three million, that of 1904 less than two million,[3] that of 1908 a million and a half; in 1916 about two million and a half were contributed. Since 1896 the Democrats have never but once surpassed the Republicans, and that was in 1912 when the Republicans were split and the Democrats collected a little more than a million, while the Republicans had more than nine hundred thousand and the Progressives more than six hundred thousand.[1]

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[1] Herbert Parsons, "Why a Political Party needs Money," *Outlook*, Vol XCVI (1910), p. 351.

[2] R. Ogden, "The New Powers of the National Committee," *Atlantic Monthly*, Vol. LXXXIX (1902), p 76

[3] Walter Wellman, "Management of the Taft Campaign," *Review of Reviews*, Vol. XXXVIII (1908), p. 432.

Sources of campaign funds

These vast sums were collected from various sources. The subscriptions of persons of moderate means, even the dollar contributions, amount in the aggregate to large sums. The main reliance, however, is put on the gifts of the wealthy supporters of the party. These not infrequently give huge sums and rightly or wrongly are supposed to have acquired a weighty influence in dictating the policy of the government should the party be successful. Previous to 1907 corporations interested in the success of the party appropriated sums as large as one hundred thousand dollars from the company's treasury. In former times these assessments were levied upon officeholders, but this practice was forbidden, as far as federal officeholders were concerned, by the Civil Service Act of 1883. In state and local elections the candidates themselves often make contributions in proportion to the salaries of the offices they hope to obtain. In communities where the machine is corrupt, law breakers, ranging from saloon keepers to gamblers and criminals, are sometimes forced to contribute in order to gain immunity from prosecution. But, however the fund is collected, it was until recently spent without public accounting, with no restrictions as to the amount and few as to the purpose.

Contributions from corporations and assessments of officeholders prohibited

Legitimate campaign expenses:

(1) Headquarters

(2) Registration

(3) Advertising

(4) Rallies

(5) "Getting out the vote"

The legitimate expenses of a campaign are large. Headquarters, whether for national, state, or local committees, must be maintained with a corps of paid and skillful assistants. The work in registration in New York County in a presidential year required over thirteen thousand dollars, while in 1910 twenty-seven thousand dollars was spent in guarding against fraudulent registration. Advertising in this same county cost nearly thirty thousand dollars, and a single political meeting, together with the torchlight procession, cost in 1908 about ten thousand dollars. Forty thousand dollars, or forty dollars to each of a thousand election districts, was appropriated for the purpose of "getting out the vote" on election day.[2] In a national campaign most of the same expenses occur with huge additions for publication, speakers, transportation, and so forth. In addition it is customary to aid state committees with generous sums in case of need.

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[1] American Year Book (1912), p. 44

[2] This information is taken from the article by Herbert Parsons already cited.

Illegitimate expenses

The illegitimate expenses of a campaign are those forbidden both by the Corrupt Practices Act and by general statutes. One of the most frequent in large communities is payment for false registration. The most common illegitimate use of money, however, is some form of bribery by which the voter is either paid for his vote or paid not to vote for the other party.

Regulation of party organization and operations by law.

(1) Conduct of elections

(2) Elections formerly regulated only by states

Strictly a political party was until recently a purely private organization existing outside of the law and subject only to the voluntary regulations which its members might impose upon it. Such a conception prevailed until well into the middle of the nineteenth century, and effective regulation did not begin until the twentieth century. Two lines of regulation were attempted. The first related to the conduct of the elections, the printing of the ballots, and the making of returns. With the exception of the statutes prescribing the method of the choice of United States senators[1] and the "Force laws" adopted to enforce the Fifteenth Amendment[2] by establishing federal control over the elections for Congressmen and presidential electors, the federal government made little attempt to regulate or control either the elections or the operations of political organizations. The conduct of elections and the definition of illegal acts are almost entirely in the hands of the states and vary greatly. Aside from a few federal regulations to be mentioned later, each state may determine to follow the course which most appeals to it.

The Force Act of 1871

In the first Force Act of 1871 (February 28), besides defining certain unlawful acts and providing penalties for the same, it is provided that votes for representatives in Congress should be only on written or printed ballots. In the act apportioning representation, after the census of 1870, the Tuesday after the first Monday in November, beginning in 1876, was fixed as the day for the choice of representatives and presidential electors.[3] This was amended before it went into effect, to allow those states whose constitutions provided for another date to retain the old date.[1] These few laws made up the whole attempt at federal regulation of elections.

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[1] 14 Stat. at Large (1866), p. 243; 17 Stat. at Large (1871), p. 13.

[2] 16 Stat. at Large (1870), p. 144; 16 Stat at Large (1871), p. 433; 17 Stat. at Large (1871), p. 13.

[3] 17 Stat. at Large (1870), p. 28.

State regulation to weaken control of the organization.

Meantime groups of states were discovering that the mere regulation of the conduct of elections was not sufficient to break the hold of a powerful party organization, still less of a machine. Consequently statutes were enacted to place the control of the party in the hands of the voters. These group themselves around the provisions for nomination by petition, the control of the primaries, the choice of the committees by the voters, and finally in an assault upon the convention as the citadel of the machine by means of the direct primary. The significant features of these movements have been discussed, but it is necessary to remember that, although they are state laws primarily for the regulation of the action of political parties within the state, they affect equally the action of the parties when performing national functions. Thus representatives in different states may be nominated in different ways, and delegates to the national convention may be required to be chosen by state law in a way unsatisfactory to the national committee of the party. This conflict actually occurred in 1912, and was boldly met by the Republican convention in declaring that its delegates should be chosen according to party rules rather than state law.

(1) Nomination by petition

(2) Popular election of committees

(3) Direct primaries

In one feature of the regulation of the activities of political parties the state and national governments have proceeded along parallel lines. These deal with party finances. The insurance investigations in New York in 1904 and 1905 disclosed the fact that large corporations, particularly life insurance companies, were giving large sums to the campaign funds of political parties. Subsequent investigations of railroads showed similar practices. As usual the states took the lead, and laws were passed forbidding corporations to contribute to any political campaign, requiring the publication of the contributions and expenses above a certain amount, and in some instances fixing the amount which might be spent in behalf of any candidate, sometimes covering the election only, and sometimes including both nomination and electoral campaign. In 1907 the federal

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[1] 18 Stat. at Large (1872), p. 400.

State and federal laws forbid contributions by corporations and require publicity

government followed suit. The statute made it unlawful for any national bank or corporation organized under public law to contribute to any campaign fund; and also forbade contributions from all other corporations to the campaign funds of any presidential elector, representative, or senator.[1] Three years later it was made compulsory for every national political party to file their accounts showing the contributions and expenses with the clerk of the House of Representatives within thirty days after the elections.[2] In 1911 this was still further amended to require that the statements must be filed both ten days before the election and thirty days after. Moreover, senators and representatives must file returns for the expenses incurred at the primaries. Finally, the amount which could be legally spent in a senatorial campaign was limited to ten thousand dollars, and in a congressional to five thousand dollars. In no case, however, could a candidate for either office spend more than was allowed by the laws of his state.[3]

They also limit amount that may be spent on campaign

Party organization necessary to solidify public opinion and express popular will

Much has been written about the evils of party organizations, and many attempts have been made to destroy them. Evils do exist and undoubtedly will continue to exist, but the fact that the organizations are susceptible of misuse should not obscure the fact that they are indispensable. They perform a function absolutely necessary to the conduct of the government, and without them public opinion could not be solidified, nor could united action be taken. When it is remembered that over eighteen million voters must express their preference for presidential electors to choose the president, and the same number divided into groups must unite upon candidates, the necessity of organization may be somewhat appreciated. Even in the choice of representatives over two hundred thousand people are concerned, a population larger than most of the states at the time of the adoption of the Constitution.

American and English systems contrasted

Again, as has been pointed out, while in the English parliamentary system the identity of party organization and the state executive insures the performance of the wishes of the majority, no such thing is possible in the United States. The national parties are concerned not merely with the choice of the president, but they attempt also to gain party control over both Houses of Congress in order that their policies may be carried out.

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[1] 59th Cong, 2d Sess., chap 420, 34 Stat. at Large, p 864

[2] 61st Cong., 2d Sess, chap. 392; 36 Stat. at Large, p. 822.

[3] May 19, 1911, 62d Cong., 1st Sess., chap. 33; 37 Stat. at Large, p. 25.

Harmony between national and state parties necessary

Constitutionally there are few points of contact between the parties organized for national purposes and the parties organized within the states. But since they operate upon the same set of voters, and since very often the state laws determine to a large extent the conduct of the party and the course of the campaign, harmony if not identity of organization is necessary. Since, moreover, in the federal system the police powers are left to the states, a party having a national policy affecting individuals in their private relations must control the states in order to make it effective.

Municipal parties most effective when in harmony with state or national parties

In like manner, although to a less degree, the political parties of cities must be organized in harmony with those of the state and nation. Party efficiency in carrying state and national elections teaches this from one point of view. From another point, as well, the city and state political organizations are mutually concerned. Until absolute home rule for municipalities is achieved — a condition extremely unlikely ever to be realized — the city must be dependent upon if not absolutely subject to the state. The state legislature makes the laws, the state officials, if not administering them, at least supervise their administration. Therefore, greater harmony and less friction, as well as greater satisfaction, come when the same party controls both the city and state government. For this purpose municipal parties, like state parties, adopt the names of the national parties and pretend to stand for the same principles. But more important than identity of principles is harmony if not identity of organizations, so that the municipal party may have the protection and reap the benefits of the dominant organization.

Party to be completely effective must control state and city as well as national government

A political party has been correctly defined as a permanent organization for the purpose of gaining control of the government by the election of its candidates in order that it may direct the public policy of the government. Since, however, the sphere of government is divided between the nation, state, and city, to impose a comprehensive policy upon all of these would require control of these three instruments of government. To accomplish this most efficiently and successfully the organization or instruments of the party within the different divisions must be coordinated and subordinated. This is exactly what happens in a presidential campaign. There national, state, and local organizations are all working for a single end; there is demonstrated the necessity for a single party for state and city. But in state and local, as well as in presidential, campaigns, the action of the government is best directed through interrelated organizations.

CHAPTER VII

THE ELECTION OF THE PRESIDENT

CONSTITUTIONAL AND LEGAL PROVISION CONCERNING THE ELECTION OF THE PRESIDENT

Experiences of Confederation showed need of single strong executive

The experience under the Confederation convinced the members of the convention of 1787 of the necessity of creating a strong executive. A few proposals were made looking toward an executive council, but after comparatively little discussion the convention decided upon a single executive — a president.

Term of president, four years

The method of choice and the term of the president required longer consideration. The fear of despotism and the fixed habit of frequent elections each tended to reduce the length of the term, while the obvious advantage which experience would add argued against any limitation upon reelection. It was finally decided that the term should be four years, with no restrictions upon reelection. The age of Washington and his weariness of party conflicts caused him to retire at the end of his second term. Jefferson followed his example, although he emphasized the theoretical dangers of a third term. Thus a precedent was created which, although strengthened by time, has no legal but a strong moral force. Only two presidents have dared to question it. General Grant vainly sought renomination from the Republican party in 1880, and Theodore Roosevelt also sought in vain the Republican nomination in 1912. The supporters of Grant acquiesced in his defeat and supported the regular party nominee. The followers of Roosevelt, however, created a new organization, which gained more votes than were cast for the regular Republican candidate. The issue was not solely upon the question of the third term, nor can it be established that the breaking of the long-established tradition lost Roosevelt many votes which he otherwise would have received; nevertheless, his action was felt to be contrary to the traditional American

Two-term precedent

Attempted violation by Grant, 1880

Roosevelt, 1912

practice and furnished a point of attack for his opponents. Whether his defeat should be considered to have strengthened the tradition is a matter of opinion; and it is also doubtful whether the tradition would still have operated against him had he been the candidate of one of the long-established parties.

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Proposed election by Congress would have broken down the theory of separation of powers and made a parliamentary system possible

The method of electing the president long vexed the convention. Opinion, almost unanimous against direct election by the people, seemed hopelessly divided as to the actual process to be employed. The prevailing sentiment during the early weeks of the debates was overwhelmingly in favor of an election by Congress, and this method was twice adopted — once unanimously — only to be reconsidered. Had such a plan been the final one it is conceivable that the American theory of separation of powers might have broken down, and it is possible that the English system of responsible or parliamentary government might have in time developed. Finally, in the last days of the convention the method of indirect election by electors chosen by the states was agreed on.

State control over choice of presidential electors

The finished draft of the Constitution reduced the action of Congress to a minimum. Article II, Sect. i, clause 2, provided that "each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress. . . ." The method of choice of electors is thus absolutely in the hands of the state legislatures, and so complete is their power in this respect that they may vest their appointment in any body they see fit — "in a board of bank directors, a turnpike corporation, or in a synagogue," as one writer has put it.[1] As a matter of fact, however, the electors have always been chosen either by the legislatures or by direct election within the states. Until 1812 the majority of the states by law vested the choice of the electors in the legislature, although at every election there was at least one state in which the electors were chosen by popular vote. From 1812 onward the majority of the states have followed the plan of popular election. South Carolina, however, did not adopt it

Now chosen everywhere by popular vote

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[1] Dougherty, The Electoral System of the United States, p. 21; quoted by Willoughby, The Constitutional Law of the United States, Vol. II, p. 1126.

1860, while the Colorado constitution of 1876 reverted to the older method.[1]

Whether the electors should be chosen by districts or upon a general ticket has also been answered variously. At first, since the electors were generally chosen by the legislatures of the states, the state was regarded as the constituency, and all the electors represented the majority of the legislature, while the minority in the state, no matter how large, was unrepresented. Nevertheless, in some of the more democratic communities, the rights of the individual local districts were recognized. By 1828 the number of states which chose electors by districts had declined to four, and from this time on the general rule was to choose all the electors upon a single general ticket. One reason which strengthened this tendency was the development of political parties and the decline in importance of the functions of the electors. Although, legally, the presidents were chosen by the electors, the electors themselves were morally bound to express the will of the popular majority within the state. Party policy made it of advantage that the electoral vote of a state should be as large as possible — unanimous if possible — hence the district system gave place to the general ticket, and the entire electoral vote was determined by the popular majority within the state, while the minority, no matter how large, was disregarded. This practice is now universal in all states. So strong had this custom become that when in 1892 Michigan experimented with the district system, the law was questioned in the courts. The Supreme Court upheld it in an opinion which summarized the debate in the convention and the practice of the states. The portion which bears upon the particular question is as follows:

Reasons for choice on general ticket

> If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the state in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized

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[1] J. H. Finley, The American Executive, p. 332.

to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature, to whom the whole subject is committed.[1]

President not elected by popular vote

This use of general tickets and large constituencies, from which minorities are discarded, still further emphasizes the fact that the president is not elected by popular vote. Out of the ten elections held since 1880 the successful candidate, although receiving the majority of the electoral votes in all the elections, has received a majority of the popular vote only five times. For example: in the election of 1912 President Wilson with a popular vote of a little over six million gained four hundred and thirty-five electoral votes. His leading opponent, ex-President Roosevelt, polled more than four million votes and gained only eighty-eight electoral votes; while the entire popular vote cast for all the candidates other than President Wilson was more than eight million, and resulted in only ninety-six electoral votes.

Election by states and use of general tickets lead to concentration on doubtful states

Certain very important consequences result from this condition. Politicians are led to concentrate their attention upon doubtful states which have a large electoral vote. Thus, in the election of 1884 the Democrats were successful in carrying New York by a majority of only about a thousand votes. These thousand votes, however, determined the character of the thirty-six electoral votes of New York, which in turn determined the election of President Cleveland. Hence, in a closely contested election the value of even a small majority in a single state becomes so important that the temptation to bribery and corruption becomes enormous. On the other hand, since there are as many electors as there are senators and representatives combined, a majority of whom is necessary for choice, the successful candidate must have more than merely a sectional support. Through the massing of the population in a few contiguous states, an unchecked popular election might result in a sectional election. But unless the population becomes decidedly more concentrated than it is at present such a result is impossible. It is, however, entirely possible for the states north of the Ohio River to control the majority of the electoral vote, and

Sectionalism prevented

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[1] *McPherson* v. *Blacker*, 146 U S. 1, 25–26.

since the Civil War this has been the case in every election in which a Republican candidate has won; but such a majority was obtained only by combining the East with the Middle West and Pacific states, thus avoiding the taint of sectionalism.

Electors chosen in November meet and vote in the following January; votes counted in February

By the law of 1845 the electors are chosen in the states, whatever method may be adopted, on the same day, the Tuesday following the first Monday in November. According to the act of 1887 the electors must meet and vote within the various states at such places as their respective legislatures shall direct, upon the second Monday in the following January. Upon the second Wednesday in the following February the Senate and House meet in joint session in the chamber of the House, where the president of the Senate opens the votes of the various states, and four tellers, two from the House and two from the Senate, count the votes.

How the electoral votes are counted

It is to be noted that the provision of the Constitution[1] regarding the counting of the votes reads as follows: "... the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted...." In assuming the prerogative of counting the votes, which involves the passing upon their validity, Congress has usurped a function which the framers of the Constitution intended to be entirely in the hands of the states. The action of the convention would lead to this conclusion. During the first sessions the sentiment was overwhelmingly in favor of a congressional election, but in the final draft Congress was reduced to a mere witness. The early practice also leads to the same belief; for until 1809 the president of the Senate opened and counted the votes, the Houses acting merely as witnesses. Not until 1821 did Congress claim the power to pass upon disputed returns. Until 1876, however, the counting and passing upon disputed votes was regulated entirely by resolution of Congress, and the duty of the president of the Senate was confined to merely opening the votes. In the election of 1876 four states sent plural returns, in all twenty-one votes were in dispute, any one of which would have elected the Democratic candidate. Two questions were involved: Which

The election of 1876

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[1] The Constitution of the United States, Amendment XII.

of the returns were the legal ones, and who should pass upon the question of the legality? Since the Houses were of opposite political complexion no joint action was possible. Recourse was had to the creation of an electoral commission, consisting of five members of the House, five from the Senate, and five of the Justices of the Supreme Court, who should have power to pass upon the validity of the disputed returns. This body, to say the least, was absolutely extra-legal if not unconstitutional, yet so strong had the habit become of allowing Congress to pass upon the returns and to count the votes, and so great did the crisis seem that this method was acquiesced in, although the defeated candidate polled a popular vote of over two hundred and fifty thousand more than the successful one.

The electoral commission

Method of counting votes determined by law of 1887

In 1887 a law was passed to prevent a recurrence of this danger. In brief, the act, which is extremely long and detailed, provides that the state authorities shall by certain forms certify to the validity of the choice of electors of the state, and the returns from those so lawfully certified shall not be questioned by Congress. But section 4 of the act goes on to say that "the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified." Senator Sherman declared: "That is a dangerous power. It allows the two Houses of Congress, which are not armed with any constitutional power whatever over the electoral system, to reject the vote of every elector from every state, with or without cause, provided they are in harmony in that matter."[1] Nevertheless, although the constitutionality of the act has been questioned by theorists, and although not all the dangerous possibilities are satisfactorily met, it has two merits: it perpetuates a system which has had the sanction of nearly a century of usage, and it makes it practically impossible for the dangers of 1876 to recur.

Defects in original method of choice of president:

According to the original form of the Constitution the electors were to vote for two persons without designation of office, and the candidate who received the highest vote, provided it was a majority, was declared president, and the candidate obtaining the next highest vote, vice president. The early elections revealed two serious defects in this method. It was perfectly possible for the president and vice president to be of opposite parties. This was the case in 1797 when the Federalist Adams found himself paired with his most bitter opponent, Jefferson. Again in 1800 all the Democrats desired Jefferson as president, while few would have wished to see Burr in that office; yet party discipline was so strong that Jefferson and Burr each received the same number of votes. In such a case the Constitution provided:

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1137; see also Dougherty, The Electoral System of the United States.

(1) President and vice president might be of opposite parties

(2) Tie votes

> If there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President, and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President.[1]

The Twelfth Amendment

To remedy these conditions the Twelfth Amendment was adopted, which provided for the separate voting for the president and vice president. Furthermore, if no candidate gains the majority of the electoral votes, the election is carried to the House of Representatives:

Provisions for choice of president by the House

> . . . then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice.

Provisions for choice of vice president by the Senate

If the House shall not succeed in choosing the president before March 4, the vice president shall become president. The provisions concerning the election of the vice president are similar to those for the president, except that, in case of failure of any candidate to get a majority of the electoral vote, the election is taken to the Senate, where a choice is made from the two highest names on the list. A quorum consists of two thirds of the whole number of senators, and a majority of the whole number is necessary for choice.

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[1] The Constitution of the United States, Article II, Sect i, clause 2.

Congress not obliged to choose the candidate securing the highest electoral vote

Although this method decreases the opportunity for intrigue and is intended to insure the election of the candidate receiving the highest electoral vote, the election of 1825 showed that the system was not perfect. At this election the four candidates received the following votes: Jackson, 99; Adams, 84; Crawford, 41; Clay, 37. Jackson and Crawford were from the same party, and Clay and Adams were both from that section of the party which afterwards became the Whig. Calhoun, the candidate for vice president, received 182 votes and was therefore declared elected. The election of the president was thrown into the House. Here Clay was very popular, but since his name was fourth on the list he could not be considered in the voting. He, however, used all his influence for Adams and succeeded in effecting his election. Without considering the accusations of intrigue which were made at that time, it is sufficient to note that the choice of the states as shown in the electoral vote was defeated. This was accomplished by perfectly legal and constitutional means; in fact, it has been argued that the House is in no way bound to ratify the incomplete choice of the electoral votes. Nevertheless, the cry was raised that the will of the people had been defeated. This cry hampered the administration of Adams and made the subsequent victory of Jackson certain.

The presidential succession is only partially provided for in the Constitution:

Presidential succession, provision of Constitution

> In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve upon the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.[1]

Law of 1792

Under this permission Congress in 1792 provided that in case of death, removal, resignation, or disability of both the president and vice president the president pro tempore of the Senate, or in case there should be no such officer, the Speaker of the House of Representatives should for the time being

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[1] The Constitution of the United States, Article II, Sect 1, clause 5

"act as President of the United States until the disability be removed, or a President elected." This made some provision, but neither an adequate nor a just one. What constitutes the disability of a president? What body is there to judge of such disability? These questions were not answered, nor have they been in subsequent legislation. Moreover, it is possible that there might be no such officer as the president pro tempore of the Senate — in fact, such a condition existed during the first session of Congress of 1912; and the emergency might very possibly arise in the interim before the House of Representatives had assembled and had chosen its Speaker. Besides, as Madison pointed out, these officers would continue to exercise their legislative functions, and thus the theory of separation of the executive and legislative departments would be broken. The law was unjust, as it would be possible that either or both the president pro tempore of the Senate and the Speaker of the House might belong to the opposite party from the president and vice president.

Law of 1792 not adequate

Law of 1886 provides for succession to cabinet officers in order of establishment of their departments

Five times the vice president has succeeded to the presidency.[1] But until the death of Garfield, before Congress had been organized, the failure to provide adequately for the succession was not acutely realized. In 1886 a new law was passed providing that the succession should go to the cabinet officers in the order of the establishment of their departments. The act is silent as to whether such officers should hold during the unexpired term or until a new election should be ordered. The power to decide this is apparently retained by Congress.

Impeachment

Although there is nothing in the Constitution which defines the disability of the president, a method for his removal is provided by the Constitution: "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."[2] By previous sections it is provided that the House has the sole power to impeach any officer, while the Senate has power to try the case. Punishment in cases of successful impeachment is removal from office and disqualification from holding any office of honor, trust, or profit under the United States. Only once has the impeachment of a president been attempted, and that unsuccessfully. In 1867 the House impeached Andrew Johnson, ostensibly on the ground of violation of the Tenure of Office Act, a measure in itself of doubtful constitutionality, but actually because Congress was attempting to carry out policies in opposition to the president. Although both Houses had majorities opposed to the president and could thus pass measures over his veto, they were unable to assure themselves that the laws they passed would be executed to their satisfaction by the appointees of the president. In spite of the passions aroused at the time, there was so little evidence that the president was guilty of any high crime or misdemeanor, certainly not of treason, that the impeachment proceedings failed.

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[1] Tyler, 1841; Fillmore, 1850; Johnson, 1865; Arthur, 1881; and Roosevelt, 1901.

[2] The Constitution of the United States, Article II, Sect. iv.

Attempted impeachment of Johnson

THE NOMINATION AND ELECTION OF THE PRESIDENT

Development of political parties unforeseen in 1787 made changes in Constitution necessary

Thus far the constitutional and legal method for the choice of the president has been discussed. But beyond the requirements of the Constitution, and even contrary to its spirit, political parties have developed a process, which until recently was unknown to law, but which determines the method by which the office is filled. It is evident that the framers of the Constitution had no true conception of political parties — to the statesmen of that day they seemed factions to be avoided. Thus, in the method originally designed for the election of the president, not only was the action of parties not provided for, but the electoral college was praised as a feature designed to diminish the effects of such factions. Nevertheless, the third administration showed a president and vice president holding diametrically opposite views, and the election of 1800 resulted in a tie between the Democratic candidates for president and vice president. The Twelfth Amendment was adopted to prevent such further confusion, but incidentally it was a recognition of the power of parties and resulted in the reduction of the electoral college to a mere cog in the electoral machinery.

The Twelfth Amendment

As in all party elections, the choice of the president involves two distinct steps: nomination, or the determination of the

Nominations for presidency:

(1) by Congressional caucus

choice of the party; and election, or the attempt to make such choice of the party the choice of the constituency. Until the fifth campaign, the election of 1804, there were no regular party nominees. In that year, however, all the Democratic-Republican members of Congress met in "caucus" and unanimously nominated Jefferson and Clinton for president and vice president respectively. This method was continued until 1824, when its nominee suffered defeat. Although the congressional caucus was used for twenty years, its authority was by no means willingly acknowledged. Indeed, the system lost rather than gained in influence, so that in 1820 the caucus adjourned without making any formal nominations, — a fact, however, which made little difference, as Monroe, the president, had by precedent a claim to be his party's candidate a second time.[1]

[Objections to caucus]

One of the objections to the congressional caucus was not that it interfered with the constitutional freedom of the electoral college, — which it did, — but that it restricted the freedom of popular choice, which was not provided for by the Constitution, but which had been obtained in the majority of the states. Another objection which was urged was that the nomination by the party in Congress ignored the existence of the party in those states in which the party was in the minority. Thus the choice of candidates was made not by representatives from the party throughout the whole country but by that section of the country in which the party was in the majority. The convention system, later adopted, went to the other extreme, and, as will be shown, made it possible that the nomination may be determined by delegates from states which never cast an electoral vote for the party's candidates.

(2) by state legislatures

(3) by national conventions

After the fall of "King Caucus" no definite method was generally adopted for several years. Jackson was indorsed by the legislature of Tennessee and by various popular unofficial assemblies. In 1831 assemblies of delegates from most of the states were held by the National Republican and Anti-Masonic parties. And by 1840 national conventions for the purpose of nominating candidates and adopting resolutions setting forth the policy of the party were held by all the important parties. From that date the practice has become universal.

National committees manage party machinery

But before describing the operation of the nominating conventions attention should be given to the work of the national committees of the parties. These committees, at first as self-constituted bodies, brought the convention into existence; and to-day they constitute the sole permanent organization of the parties. This can be easily seen from studying the origin of the Republican party and the operations of its national committee. The Republican party was organized locally, and local committees directed its activities within the states. The chairmen of nine state committees united in signing a call for all Republicans to an informal meeting "for the purpose of perfecting a National Organization, and providing for a National Delegate Convention of the Republican party, at some subsequent day, to nominate candidates for the presidency and vice presidency."[1]

Origin in Republican party

This informal gathering met in Pittsburgh and chose an executive committee consisting of one from each state represented in the convention, which in turn issued the call for the National Republican Convention. At this convention a national committee consisting of one delegate from each state or territory was appointed to act for the next four years, — a practice which has been followed ever since. In the Democratic party a permanent body known as the national committee has existed since 1848, while before that date the party conventions were engineered by unofficial and temporary committees.

Origin in Democratic party

Powers and functions of national committee

The functions and duties of these national committees are many and important. First in time, although not in importance, is the selection of a city in which to hold the convention. Various considerations are brought into play, but the predominant ones seem to be convenience and money. A central city easily accessible is sought for convenience, but, as in the case of the Democratic choice of Denver in 1908, the possibility of a "junket" sometimes weighs more heavily. Another motive may be to intensify the party enthusiasm within the section chosen. The success of this, however, may be doubted. The financial negotiations are carried on openly, and representatives from

Selection of place of convention

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[1] Jesse Macy, Party Organization and Machinery, p. 67; see also P.O Ray, An Introduction to Political Parties and Practical Politics, pp. 174–175

various municipal organizations bid against one another, offering large contributions to the campaign fund.[1]

Call for selection of delegates

Of greater importance is the call issued by the committee. This document, nominally addressed to all the members of the party throughout the Union, is really intended for the numerous committees — state, congressional, and local — which every party spreads throughout the country. Besides designating the time and place of meeting of the convention, the call provides for the number of delegates to be chosen and the method of their choice. The delegates may be divided into two classes: (1) the delegates at large, four from each state and territory, and two at large from Alaska, Porto Rico, Hawaii, the Philippines, and the District of Columbia; and (2) the district delegates, two from each congressional district within each state. Thus each state is entitled to twice as many delegates as the state has electoral votes. In addition, for every delegate is chosen an alternate to serve in case the delegate is incapacitated.

Method of choice of delegates prescribed by Republican national committee

Until 1884 neither of the great parties prescribed the method by which the delegates should be chosen. In that year, however, the call issued by the Republicans directed that the delegates at large should be chosen by conventions, and allowed the delegates in the congressional districts to be chosen either by conventions within the districts or by the district delegates to the state conventions. In 1888 the Republican convention adopted the rule that the district delegates should be chosen in the same way as the nomination for a member of Congress was made in that district. The calls for the subsequent conventions of the Republican party contained similar directions. The Democratic party has not been so specific and has left it to the Democrats in each state to determine the method by which the delegates shall be chosen.

Left to state committees by Democratic national committee

Until the campaign of 1912 there was little dispute over the power of the committee to enforce its regulations. Before the

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[1] The *New York Times*, January 10, 1912, stated that the Democratic National Committee received the following offers: from Chicago, to pay reasonable expenses, and a guarantee of $40,000 to the campaign fund; from St. Louis, to pay reasonable expenses only, with pledges not to raise hotel rates; from New York, $25,000; from Baltimore, a certified check of $100,000. The committee voted to hold the convention at Baltimore.

Conflicts between rules of party and laws of states

conventions of 1912 met, however, eleven or twelve states adopted laws providing, in various ways, for the choice of delegates by direct election rather than by conventions.[1] The committees of both parties, but especially of the Republican party, were then forced to face the issue as to whether their rules or the laws of the states were to prevail in the choice of delegates. The committee of the Republican party met in Washington in December and issued the call for the convention. In this call, however, it was provided that "the delegates and alternates, both from the states at large and from each congressional district, should be elected in conformity with the laws of the state in which the election occurs, if the state committee or any such congressional committee so direct."[2] Thus the primary system of choice of delegates could be employed only in those states where the state law was mandatory, not permissive, and then only with the approval of the party committees. In the Democratic committee Bryan tried to carry a resolution providing for the election of all delegates by means of the primaries, but he was overruled, and the committee adopted a rule similar to that in the Republican call.

The preconvention campaign in 1912

In ordinary campaigns the question as to the method of the choice of delegates would have aroused only a passing interest. The preconvention campaign of 1912, however, was extraordinary in both parties. In the Republican party ex-President Roosevelt and President Taft were contestants for the nomination; while in the Democratic party Speaker Clark, Governor Wilson, Governor Harmon, and Representative Underwood were contesting for the nomination. In both parties the contestants traveled over the country appealing directly to the people, since in at least eleven states the choice of delegates depended entirely upon popular action manifested at the primaries rather than upon the skillful manipulation of conventions by the leaders. Moreover, in eight states, at the primaries, a vote was taken expressing the preference of the voters for the party's nominee. The preconvention campaign showed that Roosevelt carried every state where the delegates were directly chosen, except Massachusetts, where the ticket was divided. Taft, on the other hand, carried a majority of those states where the delegates were chosen by conventions. As a result the partisans of Roosevelt claimed that where popular opinion had been consulted it was overwhelmingly in favor of their candidate. The Taft supporters, on the other hand, possessed an actual majority of the delegates and would be in control of the convention should it be organized as the previous ones had been. In the Democratic party Speaker Clark had more delegates, chosen both by the primaries and conventions, than any other candidate, but lacked the necessary number for choice.

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[1] Pennsylvania, Wisconsin, Oklahoma, South Dakota, Oregon, New Jersey, North Dakota, New York, Nebraska, California, Maryland, Massachusetts, Illinois —*American Political Science Review* (1912), p. 429

[2] American Year Book (1912), pp. 1–2.

Organization of the national convention

The temporary roll

Influence of national committee illustrated in 1912

The next, and in some respects the most important, function of the national committee is the organization of the convention. This involves making a temporary roll, which in turn involves passing upon the merits of contesting delegations. The importance of this duty can be appreciated from a review of the organization of the Republican convention of 1912. The national committee which had been chosen by the convention of 1908 to elect President Taft was overwhelmingly in favor of his reelection. To this committee were submitted about two hundred and fifty-four contests of varying merits. Of these, two hundred and thirty-five were decided in favor of the Taft delegates and nineteen in favor of the Roosevelt delegates, giving a majority of about twenty upon the temporary roll call in favor of those who supported Taft. The importance of this temporary roll may be appreciated when it is realized that the delegates thus temporarily seated elect the committee on credentials and have the final authority to settle all contests and thus to determine the permanent membership of the convention. Rarely does the majority of the convention reverse the ruling of the national committee, for in so doing they would diminish their own power and exhibit a self-denial seldom found in politics. The Republican convention of 1912 was no exception. The convention adopted the report of the committee on credentials which sustained the national committee in every instance, whereupon the supporters of Roosevelt refused to take further part in the proceedings.

Selection of temporary chairman

One other function is performed by the national committee at the convention; namely, the selection of the temporary chairman to preside over the convention until its permanent organization is completed. Under ordinary circumstances the nominee of the committee is accepted by the convention. In 1884, however, the Republican convention rejected the nominee of the committee, although following its advice in other respects. In 1896 the Democratic convention refused to elect Senator Hill, the choice of the national committee and the leader of the "Gold Democrats," and chose Senator Daniels of Virginia, who was one of the leaders of the "silver wing" of the party. In like manner, in 1912, the more conservative politicians upon the Democratic national committee nominated Judge Parker as temporary chairman and, in spite of the opposition of Bryan, elected him, although the convention ultimately followed Bryan's advice in most other respects.

Duties and powers of the temporary chairman

"Keynote" speech

Rulings

The temporary chairman in his speech of acceptance sounds what is known as the "keynote" of the convention, and, as the selection of the national committee, although chosen by delegates temporarily seated, is able by his rulings to carry out the plan of the committee. The committee makes up the temporary roll of the convention, which chooses the temporary chairman and the committee on credentials. This committee on credentials presents a report which forms the basis of the convention when finally organized. In arriving at this final organization there are numerous instances where a presiding officer in sympathy with the national committee can be of the greatest assistance. To illustrate: As has been said, there were a large number of contesting delegations at the Republican convention of 1912, many of whom were disposed of by the unanimous vote of the national committee. There were, however, seventy-two delegates put upon the temporary roll by the vote of those in the committee who favored Taft. Since the Taft majority in the convention could be only about twenty, counting the seventy-two delegates who had been seated by the vote of the national committee, it was of vital importance that these seventy-two contests be decided in favor of Taft. These delegates were on the temporary roll, and they aided in the election of Senator Root

Illustrated by Republican convention of 1912

as temporary chairman, and they helped accept the report of the committee on credentials seating themselves. It was urged that none of the delegates whose seats were contested be allowed to vote, but the chairman ruled that only those whose seats were the subject of the particular vote should be excluded. As a result the seventy-two contested delegates in turn voted to seat one another. The ruling of the temporary chairman has been much criticized, yet it was in accord with the practice of previous conventions. It is difficult, moreover, to devise a plan by which either the contesting delegations are not temporarily seated or to avoid the possibility of having no delegations seated at all, should some unscrupulous leader stage a sufficient number of contests. This charge was freely made against the Roosevelt supporters, and although there is little evidence to prove it, the number of contests which even his spokesmen refused to sustain in the national committee is suspicious. The power of the national committee in the convention may be liable to misuse, but it seems that such power must be placed somewhere. After all, the difficulty is not so much with the power of the committee as with the fact that the committee is the product of the political conditions of four years previous. Moreover, when the president is himself a candidate for reelection or actively pledged to the support of another candidate, his wishes with the committee are apt to assume the force of commands. Some of the direct primary laws provide that the committeemen be elected along with delegates directly by the voters. This would seem to solve the difficulty presented at Chicago in 1912, and to those who enthusiastically advocate the extension of the direct primary system the suggestion has great merit.

Difficulties arise from fact that the national committee may represent past rather than present political conditions

Composition of national convention

A convention consists of twice as many delegates from each state as the state has representatives and senators in Congress. In addition, delegates are chosen for the territories, the District of Columbia, and the insular possessions. Hence the actual membership of a convention numbers about eleven hundred. Moreover, for each delegate an alternate is chosen, who, although he has little power, adds to the number who attend the convention.

Delegates from territories

Although the inhabitants of the territories do not vote for presidential electors, nevertheless both parties believe it to their advantage to accustom them to organized party action. In addition, the convention seems more truly a national assembly if delegates from all parts of the country are present. There are, however, other reasons more closely connected with the practical side of political manipulation which are probably operative. In communities where the population is small or where the party strength is slight there is more opportunity for an experienced politician to exercise greater control than where the party vote is numerous or the population is large. The delegates from the territories and from the insular possessions are not numerous enough to influence the result to a very marked degree; but frequently through the use of their proxies they furnish a seat on the national committee for some experienced leader. Far otherwise is the effect of the delegates from the South in Republican conventions, and from some of the Northern states in the Democratic conventions. As matters stood it was possible for the delegates from the Southern states, who did not furnish a single Republican elector, to hold the balance of power and thus determine the organization of the convention and the nomination of the Republican candidate.[1] In like manner, in the Democratic

Delegates from states where party is weak give opportunity for political manipulation

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[1] The following table, taken from the *Outlook*, June 29, 1912, shows the source of the vote on the question of the admission of two Taft delegates from California

	TAFT FOR ADMISSION	ROOSEVELT AGAINST ADMISSION
Southern Democratic States	234	95
Western Democratic States	16	20
Eastern Democratic States	14	
Western Republican States	142	268
Eastern Republican States	128	140
Territories	8	6
	542	529

Nearly one half the Taft vote came from states which could not be expected to cast a Republican electoral vote

"He had the solid South, which has, one may say, no voice or power in the choice of a Republican president, a few scattered votes from nominally Democratic states not in the South, a comparatively large number of votes from those Eastern states which are naturally ultra-conservative ."

Without entering into the merits of the admission of the delegates from California, this table illustrates the power of the national committee or the permanent organization of the party in those communities where either the population or the voting strength is small.

convention of 1904, it was asserted that the sixty-eight votes of Pennsylvania, a state which has not cast a Democratic electoral vote since 1856, defeated Bryan in his attempt to control the convention, and determined the nomination of Judge Parker.

Republican practice in 1916 recognized in some degree the party strength in states

From 1864 the subject of reapportioning the delegates has been discussed in at least five Republican conventions. Even at the first convention, in 1856, it was argued that the delegates from the South should not be admitted, but the desire to avoid the charge of sectionalism and to make a national appeal prevailed.[1] From that date various proposals have been made to remedy this condition, but none was adopted until the convention of 1916, where a new rule of apportionment was applied. In this convention each state had four delegates at large. There were two additional delegates at large for each member of Congress elected at large, and one delegate for each congressional district. In addition, there was a delegate from each congressional district in which the vote for any Republican elector in 1908 or for the Republican nominee for Congress in 1914 should have been not less than 7500. By this method the convention was reduced by eighty-nine delegates. New York lost two, but none of the other states north of the Ohio were affected. This plan was in no sense a radical one and had, as far as can be judged, very little effect upon the power of the committee or the ease with which the convention of 1916 was managed.

The committee on resolutions

The platform generally noncommittal

After the permanent organization of the convention is completed the committee on resolutions offers its report. These resolutions, known as the platform, are supposed to embody the principles for which the party stands; actually they are combinations of party policy and generalities designed to attract support. Thus the platform of the Progressive party in 1912 discussed questions and issues which had no place in a national campaign, but which could be met solely by state action. In general the adoption of the platform is a foregone conclusion and is merely a formal action. One remarkable exception was furnished in the Republican convention of 1896: the adoption of the declaration for the gold standard caused thirty-four delegates to secede. In the Democratic convention of the same year the debate upon the platform gave Bryan the opportunity to deliver his famous "Cross of Gold" speech, which made him three times the candidate of his party.

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[1] For details of the various proposals see an excellent article by Victor Rosewater, "Republican Convention Reapportionment," in *Political Science Quarterly*, Vol. XXVIII, pp. 610–626.

Nominations

Upon the third or fourth day of the convention the chairman announces that nominations are in order, and the secretary calls the roll of the states, beginning with Alabama. Usually a state having no candidate will yield to the state having one. Thus in the Democratic convention of 1900 Alabama yielded to Nebraska in order that Bryan might be put in nomination by his native state. In "The American Commonwealth" Lord Bryce makes the classification of candidates as Favorites — candidates of national popularity; Favorite Sons — candidates indorsed by their native states; Dark Horses — unsuspected candidates who are ready to take advantage of any compromise or wave of enthusiasm. These terms have become classic. Yet even before the day of the direct primary, the difference between a Favorite and a Favorite Son was not always clearly marked. Now, with the preconvention campaign for delegates, Favorite Sons with enough votes to become factors in the convention would almost necessarily have the prominence of Favorites. In like manner the direct primary has reduced the possibility of a Dark Horse. Delegates elected by popular election pledged to support a particular candidate are less likely to be shifted by compromises or swayed by enthusiasm than those who are not so immediately chosen by the people. The question of how far the delegates should continue to vote for the candidates for whom they are pledged has never been settled, nor is there any likelihood that it ever will be; and each delegate must be the judge of whether he has fulfilled the spirit of his instructions. His vote, whether in accord with or opposed to his instructions, is legal and cannot be questioned. It may be expected, however, that the delegates directly chosen will exhibit more stubbornness than those picked by state conventions. Such was perhaps the case in the Democratic convention of 1912, for the nomination of President Wilson was

Favorites

Favorite Sons

Dark Horses

The effect of the direct primary:

(1) on Dark Horses

(2) on instructed delegates

brought about only on the forty-sixth ballot, so persistent were the Clark delegates in observing their instructions.

Convention easily moved

An assembly of nearly two thousand delegates and alternates, meeting in the presence of ten or twelve thousand spectators, offers a dangerous temptation to an orator. Appeals to sentiment rather than to reason, attempts to rouse enthusiasm, which may easily become uncontrolled and degenerate into a "stampede," are characteristic of nominating speeches. Each speaker attempts so to stir the convention, and in this he is assisted by the delegates pledged to his candidate. At the mention of the candidate's name — usually at the climax of the speech — the delegation supporting him attempts to make a "demonstration." This may take the form of prolonged cheering lasting sometimes nearly an hour, or a procession around the convention hall, calling upon other delegations to join.[1]

"Stampede"

Demonstrations

Demonstrations usually planned and artificial

In all this the spectators aid and abet the turmoil; and oftentimes incite it, sometimes as part of a plan prepared by the manager of one of the candidates. For example, a carefully planned scheme for a stampede failed in the Republican convention of 1892. At the end of the speech seconding the nomination of Blaine, a woman in the gallery began opening and shutting a white parasol with rhythmic precision; section after section of the crowd caught the spirit, and the delegates on the floor and the spectators in the galleries rose to their feet and joined in the demonstration. As long as the woman in the gallery led the cheering the enthusiasm continued to increase, and the Harrison leaders began to doubt their ability to control the convention. Unfortunately, however, for the

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[1] The Underwood delegates "shouted and sang, marched and blew horns They stamped and clapped their hands. . . . They did all this for the purpose of impressing the convention with the charm of their candidate and his power of making his friends eager to serve him and advance his interests.

"After so much noise had been made over Underwood . . the candidates with more delegates . . . had to show how little twenty minutes of uproar meant when weighed in their scale So the Clark partisans did for an hour and five minutes what the smaller body of Underwood admirers had done for a third of that period. . . .

"And then it was up to Governor Wilson's followers to beat the Clark outbreak. They did it. The Wilson demonstration was kept going somehow for an hour and fifteen minutes . ." — *Outlook*, July 13, 1912, quoting from the *Cleveland Leader*

Blaine men, a mistake in the signals occurred and the woman left her commanding position in the gallery to lead a procession around the floor. This was enough to break the spell. Order was restored, and the convention proceeded along the line laid out for it by the national committee.[1]

Balloting by states

After the nomination of the candidates the balloting begins. The secretary calls the roll of the states in alphabetical order, and the chairman of the delegations announces the vote which is recorded by the clerks. In the Republican convention each delegate may have his vote recorded as he personally sees fit. The rules of the Democratic party allow the state delegations to determine whether they shall vote as a unit or not; and the majority in each delegation determines to whom its entire vote shall be given. This method of voting, known as the "unit rule," was formerly followed by both parties. The Republican party, however, abandoned it in 1876 and 1880; but it is still observed in the Democratic conventions. From the point of view of the leaders the unit rule has much to commend it, since it enables the leader of the majority of the delegates to deliver the full vote of the delegation, a most desirable thing in a compromise or trade. Here again the action of the direct primaries is seen to conflict with the rules of at least the Democratic party. Delegates elected and instructed by popular vote to support a particular candidate are less willing to operate under this rule since it may deprive their candidate of their votes.[2]

Republican practice allows individual vote

Democratic "unit rule"

Votes of alternates in Republican convention of 1912

In case the delegate is not present his alternate votes for him. Often delegates withdraw or absent themselves in order to give their alternates the little honor which may be derived from such voting. In the Republican convention of 1912 Senator Root ruled that where a delegate refused to vote, the vote of the alternate should be recorded. As this ruling was not applied to the delegates from California who refused to vote, but only to the two Roosevelt delegates at large from Massachusetts, who had Taft alternates, it was regarded as a high-handed bit of partisanship.[1] From whatever point of view it is regarded it is certainly an instructive example of the power of the chairman.

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[1] *Harper's Weekly*, Vol. LVI, No. 2897, p. 11.

[2] The Democratic rule was so modified in 1912 that the rule should be enforced "except in such states as have by mandatory statutes provided for the nomination and election of delegates to national conventions in congressional districts."

Nomination in Republican convention by majority; in Democratic, by two thirds

In the Republican convention the candidate receiving a majority of the votes is declared nominated. The Democratic party, however, since 1832, has adhered to what is known as the "two-thirds" rule, which requires the candidate to receive the votes of at least two thirds of the delegates. The rule was avowedly introduced to make the nomination of the candidate more impressive, and to insure the nomination of a candidate upon whom the greater part of the delegates could agree. It has been charged, however, that the real reason was to prevent the nomination of a candidate acceptable to the majority, and that it has been utilized to extort compromises. An examination of the procedure of the conventions will not bear this out. Omitting the convention of 1860, which was exceptional, in only two cases has the candidate, who upon any ballot had a majority, failed to obtain the nomination. In 1844 Van Buren obtained twenty-six more than a majority on the first ballot, but on the ninth ballot a "stampede" led to the nomination of Polk. In 1912 Speaker Clark on the tenth ballot had an actual majority of the votes of the convention, but lacked one hundred and eighty-two of the necessary two thirds. On the twenty-eighth ballot Wilson obtained the lead but not the necessary two thirds, until on the forty-sixth, when Clark gave up the fight, and Wilson received nine hundred and ninety out of a possible one thousand and ninety-two.

Little interest in nomination of vice president

After the nomination of the president the interest in the convention wanes. Candidates for vice president are nominated, but little interest is displayed in their choice, and less care given to their qualifications. Sometimes the vice presidency is awarded to a disappointed candidate for the presidency; more often someone is chosen from a doubtful state or from a group of states which the party wishes to conciliate. Sometimes it has been asserted that the vice president was chosen on account of his wealth, sometimes, as in the case of Roosevelt in 1900, to add a man with a "war record" and great popularity to the ticket. But whatever motives are operative, the office is lightly esteemed and carelessly bestowed.

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[1] See A. B. Hart, "Two for His Heels, A Study in Convention Ethics," in the *Outlook*, August 10, 1912.

For example, in 1904, at one o'clock on Sunday morning, the Democrats nominated H. G. Davis of West Virginia for vice president. Mr. Davis had been a United States senator, was a successful business man and millionaire, but was over eighty years old. There was little talk of superannuation and little general discussion of fitness. As one of the delegates wrote: "Word was passed around that Davis was the man to be voted for."[1]

National committee selected on nomination of state delegations

The convention performs one other duty before it adjourns. At some stage in its proceedings it selects a national committee to serve for the next four years. In practice the delegations from the different states and territories each nominate a member and the convention ratifies their choice. This national committee is the permanent element of the party organization. Theoretically, the convention is the final court of appeal, but from its temporary character, the shortness of its sessions, and the inexperience of most of its members its actual authority is wielded, as has been seen, by the committee or by its agent, the chairman. This fact, long appreciated by politicians, was not realized in full by the public until recent years.

With the adjournment of the convention and the commencement of the campaign the committee assumes active, open, and important duties. The size of the committee precludes any general action or deliberation, and the decisions are made and the work directed by the chairman.

Chairman of national committee choice of presidential candidate

The chairman of the national committee need not have been one of the members elected by the convention, for usually he is chosen by the committee at the suggestion of the candidate. In some of the recent preconvention campaigns the contest has developed a leader bound to the candidate by close personal ties or to whom the candidate is under deep obligations. Such a man is frequently chosen to head the national committee. Thus Senator Hanna, who for three years before the convention of 1896 began to work for the nomination of McKinley, was made chairman in both of the McKinley campaigns. President Roosevelt chose for himself and for his successor, Taft, members of his official family to conduct the two successful campaigns.

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[1] A. P. Dennis, "Our National Convention," in *Political Science Quarterly*, June, 1905, pp. 185–202.

Power and influence of chairman; his obligations and resources

Considerable criticism, however, arose over these appointments. It was urged that Mr. Cortelyou, as head of the Bureau of Corporations, had had unusual opportunities to gain information of value in the campaign and that, as Secretary of the Treasury, he had power to repay certain kinds of obligations. Although there was never any evidence produced that any such thing actually took place, public opinion was not indifferent and became actually hostile to Mr. Hitchcock, the successful manager of Taft's first campaign, who in his position as Postmaster-General was called the "office broker." Since the remarkable career of Senator Hanna more public attention has been centered upon the chairman and his power.[1] In his case there was a fortunate union of successful campaign manager with many obligations to fulfill, a personal friend in whom the greatest confidence was placed, a United States senator of growing influence, with a war president, strongly partisan, with numerous appointments to make. It is not to be wondered that almost innumerable office seekers early sought the indorsement of the chairman, senator, and personal friend of the president. It is obvious that Senator Hanna's power could have been very easily used against the president, a condition which was revealed when Roosevelt succeeded McKinley.

Power of chairman illustrated by career of Senator Hanna

Campaign funds

In addition to the potential power of the distribution of the patronage, the chairman of the national committee has the collecting and spending of huge sums of money. It is reported that for the Republican campaign of 1896 over seven million dollars was raised. The collection of this money naturally involves a certain implied obligation in determining the policy of the party, and frequently the chairman implicitly or explicitly pledges his candidate to a certain line of action. But whether this is actually done or not, an obligation is created which the chairman seeks to have the president discharge.

Treasurer of the national committee

The only other important official of the national committee is the treasurer. Frequently he is a man of great reputation, in close touch with many of the financial interests of the country. In such cases the treasurer is more apt to have more to do with the actual raising of the money than the chairman.

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[1] See Ogden, "The New Power of the National Committee," in *Atlantic Monthly*, January, 1902.

National committeemen active in respective states

The other members of the national committee are busy in their respective states. In every state the national committee cooperates with the local state committee to bring about not merely the election of the president but of all the candidates of the party for state and national offices. The member of the national committee from the state is usually the agent in such cooperation. It is his duty to see that the committee is harmonious, that the party is united, that local quarrels are patched up. In this capacity he has great power. Speaking for the national organization, he is listened to, and in influencing the distribution of campaign funds he is obeyed. In doubtful states, however, the chairman of the national committee may concentrate his efforts and direct the campaign himself.

Presidential campaign like state campaigns

A presidential campaign differs from state campaigns chiefly in that it is nation-wide and arouses national interest and excitement. The methods employed differ only in degree from those employed in state campaigns, and since the presidential electors are chosen by the states under state laws, the same rules and procedure apply to a presidential campaign and election as to state elections. One or two exceptions and interesting differences, however, may be noted.

Federal laws governing campaign contributions

Following the lead of various states, Congress has passed laws governing campaign contributions. In 1907 all contributions by United States corporations were forbidden, and contributions from corporations chartered in the several states were forbidden to campaigns of federal officers. In 1910 candidates were required to publish their campaign contributions and expenses, and in 1912 this publication was to precede the election and to cover all receipts and expenses connected not merely with the campaign for election but also with the preliminary contest for the nomination.

Presidential electors chosen according to state law

The election in November, popularly called the election of the president, is really the election of presidential electors. As has been seen, these are chosen according to the laws of the various states, which now uniformly provide for a popular vote for the electors upon a general ticket. In 1912 the laws governing the primaries held for the nomination of electors came into conflict with the practice of the Republican party. In previous

Conflicts between state law and party practice

campaigns the electors had been placed upon the ticket as the result of the action of party conventions held within the various states, summoned and managed by the state leaders of the party. In both California and Kansas the great majority of the enrolled Republicans were enthusiastic supporters of Roosevelt. The question arose whether these Roosevelt men should be allowed to place the names of electors pledged to vote for Roosevelt upon the Republican ticket. In California the Progressives had a majority of over ninety per cent of the Republican convention and nominated thirteen electors pledged to vote for Roosevelt. The Taft delegates, ten per cent of the convention, withdrew and nominated a full ticket of electors pledged to vote for Taft, and applied to the courts for a mandamus to replace the Roosevelt electors on the ticket with those they had chosen. The Chief Justice of the Supreme Court of California refused to interfere, and, in his opinion, said of the action of the Progressives:

Courts reluctant to interfere in political disputes

Case of California

> They have registered as Republicans. . . . They remained according to the test prescribed as members of the Republican party. They elected their delegates to the convention, and the convention was regularly held, and acted according to its notions of political expediency and good faith. And the courts cannot inquire into it, we cannot decide political questions. We can only decide what is legal under the state law.[1]

The result of this decision was that the electors for the candidates nominated by the Republican convention were barred from the Republican ticket. Or, in other words, as a result of the primaries, legally nominated Republican electors were Progressives and had the title of Republicans on the state ticket, while the Republicans who supported Taft were forced to seek other methods and designations for their candidate.

Case of Kansas

A somewhat similar state of things occurred in Kansas. The Taft men applied to Justices Pitney and Van Devanter for a writ of error against the judgment of the state court, which had upheld the Progressive contentions, and asked that the Roosevelt men be removed from the Republican primary ballot. The justices refused so to do, saying:

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[1] American Year Book (1912), p. 26.

> But as the courts are reluctant to interfere with the ordinary course of elections, whether primary or otherwise, as the rights asserted are not clear, but doubtful, and as the injury and public inconvenience which would result from a supersedeas or any like order, if eventually the judgment of the state court should be affirmed or the writ of error dismissed, would equal the injury which would otherwise ensue, we think no supersedeas or kindred order should be granted.

The writ of error, however, was allowed, and the matter might have been brought before the Supreme Court of the United States. The Roosevelt electors, however, carried the state primaries by over thirty thousand and then voluntarily withdrew.

These two instances are illustrations of the new problems and difficulties which the system of direct primaries has introduced into the party machinery. It is true that the election of 1912 was an extraordinary one, in that the Republican party was hopelessly divided and both factions were willing to gain any advantage which the new laws might give. Nevertheless, as the Democratic convention showed, the primaries have introduced new forces which the party organizations cannot lightly disregard. National parties are, it is true, but voluntary organizations and may make their own rules. But since they operate within states which have by law fixed and directed the operation of political parties, a conflict is inevitable unless the rules of the party are in harmony with the laws of the states. If there be a conflict, it is clearly seen from the case of California that the law of the state will override the practice of the party.

State laws supersede party practice

Election of presidential electors like other elections

The election of the presidential electors within the states is in no way different from other elections. Generally the entire ticket for state officers, representatives to Congress, and presidential electors is voted upon. The ballots are counted and the returns filed with proper state officers who follow the procedure already described.

CHAPTER VIII

THE POWERS OF THE PRESIDENT

Classification by method of exercise:

(1) Powers almost independent of Congress

(2) Powers shared with Congress; initiative with the president

(3) Powers freely shared with Congress

(4) Extra-constitutional powers

The powers granted to the president by the Constitution may be conveniently grouped in six classes: (1) the general executive power, (2) the power of appointment, (3) the military power, (4) the power in foreign affairs, (5) the legislative power, (6) the power of pardon. To these should be added the power which the president exercises as the official leader of his political party. Some of these powers the president exercises almost independently of Congress, and these will be fully treated in this chapter. Other powers are shared with Congress, but the initiative being with the president, they will also be discussed here. The complex and delicate relations which the president has with Congress cannot be understood until the functions or operations of Congress are clearly in mind, and therefore some powers must be treated both in the chapter on the president and in that on Congress. Finally, some of the powers, like the military power, are so important, and the action of Congress in furthering them so necessary, that, although mentioned in this chapter, they must be treated at length in subsequent chapters.

THE POWER OF THE PRESIDENT AS LEADER OF HIS PARTY

Party system increases and limits the powers of the president

The most important power of the president comes not from the Constitution but from the political system which the Constitution made necessary. As has been shown, the governmental machinery would not operate without political activity. This political activity is performed by means of parties. Parties direct and supplement the working of the constitutional rules, and determine the choice of the president and condition many of his actions. In other words, the president is the product of the party system. Great as his constitutional powers are, they are vastly extended through his influence as the leader of his party. Conversely, the fact that the party makes the president limits or subordinates the use of these great powers to the policy of his party. The president is at once superior to and subordinate to his party.

Party system not understood before 1800

At the first election of Washington political parties were not organized. Like many of his contemporaries he regarded them as factions dangerous to the state. Therefore, believing that he was responsible to no party and leader of no faction, he included in his cabinet advisers holding such contradictory views as Hamilton and Jefferson. To his failure to recognize even the inchoate parties of his day were due many of the difficulties of Washington's administrations. The election of 1800, however, was conducted by regularly organized parties, and Jefferson came into office as the leader of his party. Since then, with the possible exception of the second administration of Monroe when there was no organized opposition, every president has been a party president, but not necessarily a partisan president.

Party and partisan presidents

The distinction between a partisan and a party president is a vital one and is the key to the position of the president as a party leader. At times it is difficult to classify correctly a specific action. Much depends upon the point of view of the critic, and many times it is merely a question of degree. Yet the organization of political parties is so necessary, their power and their action so far-reaching, that certain broad principles must be recognized. The president must have subordinates whom he can trust and who are in sympathy with the principles of his party. To obtain these subordinates he must remove some officeholders and appoint members of his own party. Are these party or partisan appointments? To what extent should they be made, and to what kind of officials should such action be applied? These questions will be further discussed when the subject of "Civil Service Reform" is considered. But it is necessary to recognize that they are questions which even the most unpartisan executive must face and answer in a way which will accord both with the efficiency of his administration and the demands of his party. Again, the president can obtain legislation only from Congress. He must therefore recognize his party in that body, must hold its confidence, and must unite it.

President must sometimes yield to party wishes to carry out larger policy

To do so he may be forced to yield to demands which seem partisan or unwise. An illustration may be seen in the action of President Wilson in signing the Sundry Civil Appropriation Bill of 1913. This bill contained a provision which forbade the use of any of the fund appropriated for the prosecution of labor unions or farmer's associations for violations of the act prohibiting the restraint of trade. President Taft had previously vetoed a bill containing such a clause on the ground that it was class legislation "of the most vicious sort." President Wilson, however, signed the bill, although he stated that, had it been possible, he would have "vetoed that item, because it places upon the expenditures a limitation which is in my opinion unjustifiable in character and principle."[1] In fairness to President Taft and President Wilson it should be remembered that the former was the defeated candidate of a defeated party, about to retire; while the latter was the successful leader of a victorious party, which was almost unanimously in favor of this clause, and which was about to undertake a difficult and complicated program. Party unity meant more to President Wilson at the beginning of his administration than it did to President Taft upon the last day of his term of office.

Influence and power of presidents vary with personality and association

The relation of the president to his party has varied at different times. Jefferson, Jackson, Lincoln, Roosevelt, and Wilson dominated their parties.. They were leaders of their parties — to factions within them they seemed like dictators. To such an extent did Jackson dominate his party, and, through it, all the functions of the government, that Von Holst has entitled his administrations "the reign of Andrew Jackson." Yet Jackson's influence was less than that of Lincoln, who, to the attributes of a party leader, added the almost despotic war powers which Congress conferred upon him; while President Wilson exercised not only most of the powers which were given to Lincoln but, because of changed economic and industrial conditions, possessed far wider discretionary powers than were ever exercised by any other president. These powers made him not only the ruler of the nation but the absolute dictator of his party. On the other hand, Van Buren, Tyler, Hayes, and Garfield cannot be called leaders either of their parties or of opinion in the country, while Pierce was the weakest of all presidents and much under the influence of his cabinet.[1] In recent years popular approval has almost invariably been given to those presidents who lead or even coerce their parties. Thus Cleveland, even in defeat, was more highly esteemed than the faction of his party which thwarted him; and McKinley's quiet domination of his party made him one of the most powerful of the presidents. By different methods Roosevelt and Wilson brought popular approval to their support and succeeded in controlling or even compelling their parties to carry out their policies. Generally the appeal of the official leader of the party is stronger than that of an assembly.

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[1] George Harvey, "Six Months of Wilson," *North American Review* (November, 1913), pp. 577, 584.

Popular support more readily given to president than to party or to Congress

President strong because he represents whole country

One great element of strength in the president's position is the size of his constituency. The whole country chooses him. The senators are but the choice of the states and the representatives of still smaller units, but the president, alone of all elected officers, is chosen — indirectly, it is true — by the votes of the entire nation. He is thus expected to rise above the prejudices of states and sections and to speak, act, and represent the country at large. He cannot be thwarted, although he may be seriously hampered, by merely local factions within his party, for his party is not sectional but national. Such sectional discontent sinks into insignificance compared with the welfare of the whole party whose policy the president seeks to carry out. Thus, although the senators from Louisiana opposed and even voted against President Wilson's recommendation for free sugar, it is inconceivable that the vote of Louisiana should be given to a Republican candidate. It is true that where the parties are evenly balanced, local dissatisfaction may become a serious handicap to the success of the president's policy. In such cases the party may disavow the president, as the Democrats did President Cleveland, or enough votes may be lost to produce either a local change or possibly a change in the majority throughout the country. Under normal conditions, however, in the frequent compromises which are the necessary consequents of all political action the wishes of the president and his policy are the ones most likely to prevail.[1]

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[1] A. B. Hart, Actual Government, p. 260.

President's appeal to public opinion by messages

The extent to which the president may appeal to his national constituency has been much increased in recent years. The ordinary method is by messages to Congress. These messages, while nominally addressed to Congress, are utilized to explain the president's policy. The scant courtesy with which Congress during President Roosevelt's second administration treated some of his messages indicated a feeling on the part of Congress that he was using his constitutional prerogative to win support and coerce Congress rather than to "give the Congress information of the state of the Union." Both President Taft and President Roosevelt while employing this method to exert their influence made extended journeys explaining their policies and seeking support. So great was the popular demand for the presence of the president, and so considerable was the effect of these tours and appeals, that in 1910 Congress appropriated twenty-five thousand dollars for traveling expenses for the president, thus recognizing that in popular estimation at least the president is the official head of the party as well as of the nation.

Speaking tours

Power of appointment may be used to control party or strengthen personal following

The power of appointment is used to strengthen the president's position within the party. When it is remembered that the president fills positions carrying annual salaries amounting to millions, it can readily be imagined that few care to defy him. The appointing power may be used by the president to obtain legislation he desires, to strengthen the party in the country at large, or to build up within the party a group devoted to the president. It is a two-edged weapon. Used positively it may strengthen the administration and its supporters. Withholding appointments or making them contrary to the wishes of the local leaders may result in the downfall of the leader. Thus, in turn, the leadership in New York passed from Platt to Odell and then to Parsons at the wish of the president, expressed through appointments. In 1910, however, this power was threatened, but with little success. The secretary to the president informed one of the active members of the section of the Republican party known as "insurgents" that they could not expect to be consulted in the distribution of appointments since they were out of harmony with the policy of the president. As the insurgents were ready to defy the president, this threat was denounced by them as an improper use of the power of the president, and the policy was never actually carried into effect. It should be remembered that at that time neither was the Republican party united, nor had President Taft attempted to utilize his great powers to direct its policies.

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[1] H. J. Ford, The Rise and Growth of American Politics, pp. 279 et seq.

Veto seldom overridden

Through his veto power the president is a part of the legislature, and it is not often that his opponents muster the necessary two thirds to override his objections. Finally, as an executive officer enforcing the law, the president can stamp his policy upon his party, so that in the eyes of the public the action of the president expresses the ideas of the party.

President as executive may enforce his policy

President may be almost dictator of party and name his successor

With these constitutional and extra-constitutional powers the president is almost irresistible within his party. With the exception of Arthur and possibly of Hayes, no president desirous of renomination has failed to obtain it from the hands of his party. When it is remembered that the president chooses the chairman of the national party committee, and thus practically controls its action between conventions, and, as has been shown, the convention itself is largely controlled by the committee, it cannot be doubted that the president's influence is nearly supreme. Add to this the patronage which the president may put at the disposal of his supporters either to reward their activities or to build up a personal following, and it must be admitted that the president has it very largely in his power to dictate either his own nomination or that of another. This was well illustrated by the two nominations of President Taft. In 1908 he was accepted by the party at the behest of his then friend, President Roosevelt, in spite of some opposition. In 1912 he forced his own nomination in spite of the vigorous opposition of Roosevelt, whose influence and popularity far exceeded that of President Taft. It is true that with the extension of the direct primary method of nomination of delegates to the convention the power and influence of the president in this respect is likely to decline, yet his prestige will still be greater than that of any other individual.

To sum up: A popular president with a united party in the majority adds to his wide constitutional powers the authority of

Constitutional powers and power as party leader make the president one of the strongest executives

the leader of a successful party. There seems no limit to the power of such a president, and in time of war, as the administrations of Lincoln and Wilson show, the spirit of the Constitution may be violated with impunity. On the other hand, the constitutional powers of the president are so great that by skillful use of them he may control his party even after he has lost its confidence. Again, his position in our system is so commanding and he so dominates the other departments of the government that he can color the whole administration of the laws with his opinion and through their execution attract supporters to himself. Our system adds to a constitutional authority which few executives possess, the power of party leader held by the prime minister in England — even more, for the fixed term of the president makes him not responsible to the legislature, as is the prime minister, but superior to and independent of it; while the length of the term gives the president immunity from waves of discontent and renders his position more secure against popular criticism.

The President as General Executive

Original intention that president should be the political leader

It has just been shown that the power of the president as a political and party leader is enormous. This was probably the field in which the framers of the Constitution expected the president would be most active. As has been said, "In the United States it was undoubtedly intended that the president should be little more than a political chief; that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial control."[1] According to Professor Ford, the president was ". . . to take care of the government, to attend to its needs, to shape its policy, and to provide for its responsibilities."[2] The executive power which was given to him was given in specific grants: the power of recommendation and advice, the direction of foreign affairs, the power of appointment, the position of commander in chief, and the power of pardon. His position, except for his power in foreign affairs, was analogous to that of the state governors of the time.[1] Nevertheless, the executive power of the president has greatly developed until to-day he is not merely a political leader but the head of the national administration, charged with the oversight and direction of the government and the execution of the laws.

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1156.

[2] H. J. Ford, The Rise and Growth of American Politics, p. 275.

President now administrative head of government because of

This change, or development, in his position is due to two reasons: In the first place there are clauses in the Constitution which, perhaps contrary to the intent of the framers, are capable of interpretation in such a way as to extend the general executive power of the president beyond the specific grants given to him. In the second place Congress has by its interpretation and application of these clauses laid upon the president new duties and responsibilities, which greatly extend his functions as an executive.

(1) liberal interpretation of constitutional powers

(2) grants of power by Congress

The executive functions of the president are thus divided into two classes: those granted specifically, which have been mentioned, and which will be discussed in detail; and the implied executive powers which interpretation and legislation have widely developed. These last powers are in turn capable of subdivision. First, those general executive powers which are granted him by Congress in the interpretation of Article I, Sect. viii, clause 18, Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof"; and second, those which come immediately from the Constitution without the action of Congress, and are found by implication in the definition of the executive power and in the president's oath.[2]

Executive powers of president:

(1) Powers specifically granted by the Constitution

(2) Implied powers:

(*a*) Powers given by Congress under "elastic clause"

(*b*) Powers implied from the definition of the executive power

Concerning the first class of powers there can be little question. Congress can legislate upon a variety of subjects and by

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[1] F. J. Goodnow, Principles of Administrative Law in the United States, pp. 71-73.

[2] The executive power shall be vested in a President of the United States of America — Article II, Sect. i, clause 1

I do solemnly swear (or affirm) that I will faithfully execute the office of President . . . and will, . . . preserve, protect, and defend the Constitution. . . . — Article II, Sect. i, clause 7

He shall take care that the laws be faithfully executed. — Article II, Sect. iii law can give the president powers which otherwise are not granted in the Constitution in order to carry into effect the will of Congress. If the congressional act be constitutional, the executive power of the president is thereby extended. Countless examples might be cited of this congressional extension of the power of the president. The creation of new departments charged with new functions gives to the president, through his appointing power, new executive power. This was most markedly illustrated, however, in the field of interstate commerce, in 1894, at the time of the Chicago railroad strike. Congress had placed upon the national administration the responsibility of maintaining the railroads as national highways,[1] and by statute made the following provision:

Creation of new departments

Interstate commerce

> Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons . . . it shall become impracticable in the judgment of the President to enforce, by ordinary course of judicial proceedings the laws of the United States within any State . . . it shall be lawful for the President to call forth the militia . . . and to employ such parts of the land or naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States.[2]

When it was evident that the authorities of the state of Illinois were not able or willing to cope with the situation, President Cleveland ordered portions of the regular army to Chicago, against the protests of Governor Altgeld. Instead of arousing opposition, this action was approved by unanimous resolutions in both branches of Congress.[3]

Congress is more and more frequently passing laws in general terms giving the president or his appointees great executive discretion. The tariff act of 1909 provided that when the president was convinced that any country was discriminating against the commerce of the United States, he might by proclamation put into effect a higher scale of duties. The interstate commerce act of 1906 vested in the Interstate Commerce

Tariff duties

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[1] H. J. Ford, The Rise and Growth of American Politics, p. 286

[2] Revised Statutes, Sects. 5298, 5299; Grover Cleveland, Presidential Problems, pp. 94-95.

[3] H. J. Ford, The Rise and Growth of American Politics, pp. 286-287.

Commission, a commission appointed and removable by the president, the power to fix not merely railroad rates but rates charged by many other public utilities. With the declaration of war against Germany numerous acts were passed which extended the power of the president, not merely in purely military affairs but in other fields as well. This was particularly true in regard to the regulation of prices. The president was authorized to fix the price of wheat at any figure above a minimum, to fix without limit the price of coal, coke, and copper, and regulate their distribution and commandeer any manufacturing plant engaged in producing necessaries.

Emergency war legislation

Executive discretion in enforcing laws not always reviewable by the court

These acts, as well as all laws which the executive enforces, are subject to executive interpretation. In case positive action is taken and private rights infringed the individual aggrieved may appeal to the courts and obtain a judicial interpretation and possibly a remedy. But in many instances private rights are not affected in such a way that the action of the president can be reviewed by the courts. In these cases the interpretation of the president is final. Particularly is this true in the field where the statute gives the president discretionary power. Where the president takes no action by reason of his interpretation there is apparently no way he may be compelled to act. Thus President Roosevelt's decision that the anti-trust laws did not apply in certain instances allowed or permitted, by absence of executive action, conditions which, although sharply criticized by Congress, were beyond their power to alter.[1]

The other class of executive powers which may be called general are those which are derived immediately from the Constitution and may be exercised without the action of Congress. These are of a more general character than the powers expressly granted to the president by the Constitution in the classes giving him the power of appointment, pardon, and so forth, and are inherent in the executive power itself. Thus treaties are declared the supreme law of the land. How shall these

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[1] For example, President Roosevelt, acting upon the advice of his Attorney-General, refused to order the prosecution of the United States Steel Corporation when it acquired the controlling interest in the Tennessee Coal and Iron Company.

Enforcement of treaties

duly ratified treaties be enforced should Congress fail to pass the requisite legislation? This was answered by John Adams by the executive enforcement of the extradition provision of the Jay treaty for which Congress had neglected to provide. When Adams was attacked in Congress, John Marshall, then a member of the House of Representatives, defended him in an argument which the Supreme Court subsequently pronounced conclusive. The most pertinent part of Marshall's argument is as follows:

> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract: but till this is done, it seems the duty of the executive department to execute the contract by any means it possesses.[1]

Has the president inherent executive power?

The court has gone even further and has apparently affirmed the existence of a general executive power outside of and independent of congressional acts and treaties. This position is seen in the Neagle case decided in 1889. Neagle was a deputy marshal who was instructed to protect Justice Field from a threatened assault. In the course of the discharge of this duty he shot and killed the assailant of the judge. He was arrested by the state authorities, but sued out a writ of habeas corpus. On appeal the case reached the Supreme Court, which in granting the writ said in part:[2]

Opinion of the court

> . . . It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body guard to them, to defend them against malicious assaults against their persons. . . .
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> In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any

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[1] 5 Wheat., Appendix I, p. 27. See also W. H Taft, Our Chief Magistrate and his Powers, p. 87.

[2] 135 U. S. 1, 58, 59, 64, 67.

> duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of the phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . .
>
> Is this duty [that of the president to take care that the laws be faithfully enforced] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .
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> We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. . . .

Approved by President Taft

Probable application of opinion of the court

This opinion was vigorously combated by the dissenting judges,[1] and although cited with approval by President Taft,[2] must not be considered as establishing a general and indefinite executive power in all cases where Congress has failed to act. Rather the true interpretation would seem to be that exceptional circumstances may justify an executive action which otherwise might be condemned.[3]

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[1] A portion of the dissenting opinion is as follows: " . Again, while it is the president's duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution, and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the president to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter; . . . and there was not the slightest legal necessity out of which to imply any such power in the president." — 135 U. S. 83, 84

[2] W. H. Taft, The Presidency, pp 76–80.

[3] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1155.

Some presidents have at times acted as if vested with inherent executive power

Yet it would appear as if at times certain presidents proceeded upon the implied doctrine contained in the opinion of the majority of the court. It was felt by many that President Roosevelt exceeded his legal powers, when he, as executive, without express legislative authorization, withdrew from occupation certain tracts of public lands which seemed to be necessary to complete his policy of the conservation of the water power of the United States. In international affairs his action in relation to San Domingo, in proceeding to accomplish by executive agreement what the Senate had refused to ratify as a treaty, aroused great opposition, and led Senator Raynor to protest against such an interpretation of the general implied executive power as follows:

This criticized in the Senate

> Article II of the Constitution says the executive power shall be vested in a President of the United States of America. This does not vest executive power in any greater degree than Article I vests legislative power when it says that all legislative power herein granted shall be vested in a Congress of the United States, or than Article III vests judicial power except in the Supreme Court of the United States. . . .
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> . . . The president is either the executive officer of the government, vested with unlimited executive functions, or he is the executive acting under special and delegated powers. Which is he? Is he the general executive agent of the people, or their immediate representative, as was once claimed by one of his predecessors who also had an erroneous conception of his prerogative, or is he a special agent who shall look to his commission and credentials for his authority? There are unlimited executive acts performed by monarchical rulers, the exercise of which the framers of the Constitution never intended to repose in the president, and therefore they circumscribed his functions.[1]

Changed conditions and popular demand seem to sanction use of great executive power

Yet in spite of the probable intention of the framers of the Constitution, there has been a development and increase of these general implied powers of the president, just as there has been an increase of the president's executive power through congressional legislation. In spite of legal argument and political protest, it appears as if popular approval sanctioned a "strong" president in the performance of many acts derived from the general grant of executive power. It was popularly said that

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[1] Congressional Record, January 31, 1907, quoted by P. S. Reinsch, Readings on American Federal Government, p. 14.

President Taft's administration was to be one of laws and not of men, yet his administration met with more severe criticism and popular disapproval for what it failed to accomplish than did that of his predecessor who accomplished much by stretching his executive functions to the utmost. In this as in certain other departments of the government the changed social and political conditions have forced a growth and development of the Constitution, perhaps not contemplated by the framers nor justified by legal reasoning, but sanctioned by custom and popular approval. Since constitutional amendment so lags behind the popular and political interpretation, numerous illustrations might be given to show that a president who confined his actions to the literal word of the Constitution would not only lose the popular support but would find it impossible to carry on the existing system of government. More and more is the attention of the public concentrated upon the executive and more and more is constantly being demanded from him. His responsibility and power is more clearly recognized and more widely approved than that of any other department of the government.

The Power of Appointment and Removal

President's power of appointment and removal

Two of the most important executive powers of the president are the power of appointment, expressly granted to him by the Constitution, and the power of removal, which by implication and custom has been generally conceded to be his. The power of appointment, however, is not the president's exclusive prerogative. It is shared with the Senate, when acting as an executive council, and may be vested by legislation in other officers. Aside from the elected executive officers of the United States — that is, the president and the vice president — and the legislators — that is, the senators and representatives — all the officials of the United States owe their offices to appointment, or to election by one or the other branch of Congress. By the Constitution[1] the House of Representatives may choose the speaker and other officers, and likewise the Senate may choose its officers, other than the regular presiding officer, the vice president.[2] All

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[1] Article I, Sect. ii, clause 5.

[2] Article I, Sect. iii, clause 5

Important officers appointed by the president and confirmed by the Senate

other officers are appointed. The Constitution, moreover, specifies that the important officials, ambassadors, consuls, public ministers, and judges of the Supreme Court, and all other officers not designated "inferior," shall be nominated by the president and confirmed by the Senate. The appointment of inferior officers may be by law vested in the president alone, in the heads of the departments, or in the courts of law.

Definition of an "officer of the United States"

It is thus necessary to define the term "officer" and the adjective "inferior." In the case of *United States* v. *Germaine*,[1] the Supreme Court held that a surgeon appointed by the commissioner of pensions was not an officer of the United States for the reason "that all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these two modes of appointment there can be but little doubt." This reasoning was later quoted with approval in *United States* v. *Mouat*:[2]

> Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or one of the courts of justice or heads of departments, authorized by law to make an appointment, he is not, strictly speaking, an officer of the United States.

Personal representatives of the president not officers of the United States

Without attempting to classify the number of subordinates appointed by others than heads of departments or judges, it is evident that certain very important posts are held by persons who technically are not officers of the United States. For example, in 1913 President Wilson, not wishing to recognize the Huerta government in Mexico, as he would have done by appointing a minister to that country, dispatched Mr. Lind as his agent without senatorial confirmation. By the same method, although for a very different reason, President Roosevelt designated Mr. Reid as envoy to the coronation of Edward VII and was himself designated by President Taft as United States representative at the funeral of the same sovereign. In like manner, during the past years, President Wilson has employed more than one person to investigate conditions or obtain information or convey his ideas. These envoys or agents are not officials of the United States nor could they have received any compensation except from the president's contingent fund, unless Congress should later make special appropriations for them. They were agents of the president, not officers of the United States.

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[1] 99 U. S 508, 510.

[2] 124 U. S. 303, 307.

"Inferior officers," those who are subordinate in local estimation

The term "inferior officer" is not defined by the Constitution, but would seem to mean those in whom the power of appointment may not be vested; that is, persons other than heads of departments, or judges, or the president himself. This logical definition, however, would lead to a violent change in practice should Congress by law attempt to vest the appointment of any important officials in the heads of departments. For example, many of the postmasters in the larger cities, the collectors of the great ports, the superintendent of the mints, and even less important officers are appointed not by the heads of the departments but by the president with confirmation by the Senate. Should this custom, which has been followed since the establishment of the government, be altered, as Congress undoubtedly has the right to alter it, cases might come before the courts and judicial interpretation of "inferior" might be obtained. As it now stands, custom and practice interpret "inferior" to mean distinctly subordinate, not merely in the performance of duties, nor in the scale of the whole hierarchy of officials, but subordinate in local estimation as well.

Congress may not assign officials duties inconsistent with their offices

While Congress has the power to create offices and define the duties incident to them, it has not the power to designate the officials to occupy them. This is the function of the appointing power. Thus, while it has been held allowable for Congress to extend the functions of an official by the addition of germane duties, it cannot designate an official, or class of officials, to perform duties which are unconnected with the office. For example, in 1790 the justices of the Supreme Court expressed their opinion that an act of Congress making them examining magistrates for pensions was to assign to them duties unconnected with their office, and in 1851 they held a law unconstitutional which directed the territorial judge and district judge to act as commissioners for claims under the treaty of 1819 with Spain.[1]

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[1] *United States* v. *Ferreira*, 13 How. 40.

Process of appointment as prescribed by the Constitution

The method by which all appointments are made and the appointees invested with their authority is a combined constitutional and political process. The constitutional or legal steps are clearly described in *Marbury* v. *Madison*:[1]

> 1. The nomination. This is the sole act of the president, and is completely voluntary.
>
> 2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.
>
> 3. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all officers of the United States."
>
> The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the Constitution.

In actual process of appointment president relies on advice of members of party

In actual practice, however, a somewhat more complicated process is followed. It is manifestly impossible for the president to know personally the candidates or examine with care their qualifications. Even in Washington's administrations, when the number of officials was small, the president was accustomed to rely upon suggestions of senators and representatives. With the increase of the number of appointments this advice or "backing" has become more necessary and powerful. In the case of the members of the House of Representatives, such suggestions are purely advisory, and failure to comply with them can bring little unpleasant consequence upon the president. Not so with those from the Senate. This body, through the power of confirmation, can block the appointment, either by refusing to act upon the nomination or by refusing to confirm it. So conscious is the Senate of this power that at times it may almost be said that the senators suggest the names, the president submits them, and the Senate confirms the nomination. The president first consults the senators of his party from the state in which the appointment is to be made or from which the appointee comes. A custom, known as "senatorial courtesy," has grown up by

Power of the Senate to confirm or reject president's nominees

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[1] 1 Cranch, 137, 155, 156.

which the senators of the majority follow the lead of the senator concerned in their ratification or opposition to the appointment. This is well illustrated by the unsuccessful struggle of President Cleveland with the Democratic senators from New York. The President sent in succession the names of two New York lawyers, leaders of the bar, as his nominees for a justice of the Supreme Court. But the hostility of the senators prevented their confirmation and the President was obliged to choose his candidate from some other state. When both the senators are of the same party as the president, the patronage is divided between them; but when only one senator is of the president's party, he alone is consulted. When both senators are in opposition, the president consults the local leaders of his party in the state or one of the representatives. Custom, however, has gone still further, and representatives have been known to claim that inasmuch as the senators were consulted for appointments of a state-wide character, they should be consulted with regard to the nominations to local offices within their districts. This reasoning is without legal or constitutional sanction, but is based upon the very real exigencies of party politics. If the representatives of the party can have a small share of the "loaves and fishes," their path to power is made smoother, and their local influence in the party is apt to be increased.

"Senatorial courtesy"

President given free choice in case of cabinet officers

Although senatorial courtesy and congressional influence may be invoked for any and all appointments, the president is given almost free hand in certain classes of appointments. The cabinet officers are the personal choice of the president, and seldom has a nomination been defeated.[1] In like manner the heads of the important bureaus, and the ambassadors and, to a less extent, the judges, are usually left to the discretion of the president, as far as senatorial courtesy is concerned. But this does not mean that the president has free hand in his appointments. Even membership in his cabinet has been dictated by political necessity rather than by personal choice. A recent example was probably to be seen in the appointment of Senator Sherman as Secretary of State in President McKinley's first cabinet, thereby opening the Ohio senatorship to Mr. Hanna, the successful campaign manager. Political conditions, preelection pledges, and contributions to the party funds are often as great factors as diplomatic ability in appointments to foreign posts.

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[1] Taney, who as a "recess appointment" removed the deposits from the United States bank, was not confirmed in 1834; Stanbery, who had resigned to assist Johnson in the impeachment proceedings, failed confirmation when the president attempted to reappoint him in 1868; and Grant's nomination of A. T. Stewart as Secretary of the Treasury, which was made in defiance of an almost forgotten law prohibiting the appointment of a "merchant," was withdrawn after Congress had refused to repeal the law.

"Recess appointments" may temporarily thwart opposition of Senate

By the Constitution[1] the president is given power to fill any vacancies that may occur during the recess of the Senate, and to issue temporary commissions which shall expire at the end of the next session. The necessity of this provision is obvious, but in practice this power has sometimes been used in an unexpected way to thwart the desire of the Senate. Appointments have been made during the recess of the Senate and temporary commissions have been issued to hold until the Senate shall have acted upon the nomination, which would not be sent until the last days of the session. Then if the confirmation should fail a new commission would be issued upon the next day which, being in a recess, would hold over until the end of the next session.[2]

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[1] Article II, Sect ii, clause 3

[2] The following letter illustrates the method by which President Roosevelt retained William D Crum, a negro, in office, in spite of the opposition of the Senate:

OFFICE OF THE SECRETARY,
TREASURY DEPARTMENT,
WASHINGTON, January 27, 1904

MY DEAR SIR,

Replying to Senate's resolution of January 25, 1904, I beg to advise, William D. Crum was appointed collector of the port of Charleston, South Carolina, March 20, 1903, and a temporary commission issued. Mr Crum qualified by executing a bond for $50,000 and took oath of office March 20, 1903. Mr. Crum was again appointed December 7, 1903, and has given bond in the sum of $50,000 and took office on January 9, 1904. There has been no third appointment. . . .

The resolution also asks, "Is Mr. Crum now in office; and if so, under what authority of law?" William D. Crum is de facto collector at the port of Charleston, South Carolina. Whether he holds his position under authority of law is determinable not by the executive department of the government, but by the judiciary, and by that only. He is not receiving pay because of the provisions of Sect. 1761.

Very truly yours,
L. M. Shaw [Secretary of the Treasury]

Hon. William P Frye,
President pro tempore of the United States Senate

— Congressional Record, January 28, 1904, Vol. XXXVIII, Part II, p. 1302

Terms of federal officers

The terms of appointed officers, except the judges, were not defined by the Constitution nor by early legislation. Two exceptions, however, were the federal marshals and the federal district attorneys. In 1820 Secretary of the Treasury Crawford, ostensibly to secure efficiency, but really to build up a personal following, secured the passage of an act which fixed the term of certain treasury officials at four years. Subsequent legislation has extended this until practically all but the most important officers are appointed for terms of four years.

President's power of removal implied from power of appointment

Although the Constitution is silent concerning the president's power of removal and although early practice did not fix a definite term, it was decided almost at the inauguration of the government that the president's power of appointment included the power to remove those officers he had appointed. The debate upon this question took place in Congress during May, 1789, over the question of the establishment of a department of Foreign Affairs, now the Department of State. In the House, Madison moved that the secretary "shall be appointed by the President with the advice and consent of the Senate; and to be removed by the President." Although questions were raised over the power thus given the president, and the words "to be removed by the President" do not appear in the act, yet the principle Madison contended for was recognized. For in the definition of the duties of the chief clerk is found this phrase: "Whenever the said principal officer [the secretary] shall be removed by the president of the United States . . . he [the chief clerk] . . . shall be custodian of the records."[1] In this form it was adopted by the Senate, although it required the vote of the vice president to break the tie. From that time until 1867 the president exercised this power and Congress has acquiesced in it, even when Jackson removed a secretary of the treasury for the refusal to carry out his policy rather than that of Congress. In 1867, however, the first Tenure of Office Act was passed by a Republican Congress in opposition to Johnson. By this act all persons appointed by the president, with the advice and consent of the Senate, could be removed only with that consent.[2] The president, however,

Tenure of Office Act an attempt to limit the president's power of removal

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[1] 1 Stat. at Large, p. 28.

[2] 16 Stat. at Large, p. 6.

during the recess of the Senate, could suspend an officer, but within twenty days after the opening of the next session of the Senate he must present his reasons for the suspension. Should the Senate deem these unsatisfactory, the suspended officer "shall forthwith resume the functions of his office." This act was passed to embarrass Johnson, and his failure to comply with it was the leading article of the impeachment charges against him. Shortly after the accession of President Grant the law was amended so that the pretended power of the Senate to reinstate a suspended officer was eliminated, as well as the requirement that the president must submit to the Senate his reasons for his action. Such was the condition of affairs when President Cleveland came to office in 1885, the first Democratic president to be elected for nearly thirty years. As a result of the many necessary changes in the civil service, it was within the power of the Senate, then Republican in majority, to embarrass the president. This they did by utilizing the Tenure of Office Act. The particular question arose over the right of the president to direct one of his cabinet to withhold information which had been requested by the Senate concerning the removal of some officers.[1] The President vindicated his position, and in the following year the Tenure of Office Act was repealed.[2] In 1896 the power of the president to remove a district attorney within the four years for which he was appointed was upheld by the Supreme Court.[3] Hence it may be asserted that the early practice in accord with Madison's suggestions was the correct one, and that the Tenure of Office Act was of doubtful constitutionality.

The court has held that president may remove an officer before end of term

THE WAR POWERS OF THE PRESIDENT

War powers of president from Constitution and acts of Congress

The military power of the president is derived from several sources. Part comes directly from the Constitution, part is granted him as the result of congressional statute, and part is exercised under the general executive power inherent in his office. For example, from the Constitution directly comes his authority as commander in chief of the army and navy. In exercising this power the president can direct the placing of the forces and name the commanding officers, and take all means not prohibited in international law to distress the enemy. By congressional enactment the president can commission such officers as are provided for in the different branches of the service, and from the same source comes his power to utilize the militia of the states or the national forces to suppress insurrections or disorder.

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[1] See p. 187.

[2] See Grover Cleveland, Presidential Problems, pp. 28–76.

[3] *Parsons* v. *United States*, 167 U. S. 324.

It should be noted, however, that although this power comes from an act of Congress, which may be repealed or modified, the president cannot be questioned in exercising it, once it is granted. This was made clear in *Martin* v. *Mott*,[1] where the court said, construing a statute granting the president power to utilize the militia of the states to suppress disorder:

President the sole judge of discretionary powers granted by Congress

> The power thus confided by Congress to the president is, doubtless, of a very high and delicate nature. . . . It is, in its terms, a limited power, confined to cases of actual invasion, or imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the president are addressed, may decide for himself. . . . ? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the president and that his decision is conclusive upon all other persons.

It must be remembered, however, that his power, being derived from Congress, may be, by act of Congress, withdrawn, limited, or amended.

As general executive may use army and navy "to take care that the laws be faithfully executed"

As the general executive charged with the enforcement of the laws the president undoubtedly may use the military or naval forces of the country. Numerous instances might be cited of laws where this right is specifically given,[2] but the power rests on the more fundamental duty of the president to "take care that the laws be faithfully executed." This has already been discussed in the Neagle case[1] and was reaffirmed in *In re Debs*[2] in these words:

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[1] 12 Wheat. 19, 29, 30.

[2] See "Federal Aid in Domestic Disturbances," Senate Document 209, 57th Cong., 2d Sess., pp. 5–11.

> The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.

President's power varies as it is exercised in time of war or in time of peace

In considering the president as commander in chief, his power in time of war must be carefully distinguished from that which he may exercise in time of peace. For example, President Roosevelt ordered the marines detached from duty on naval vessels. In the next appropriation bill Congress in granting the money for the support of the Marine Corps provided that a certain portion of it should always be attached to naval vessels, thereby reversing the policy of the president as commander in chief. In time of war the power of the president as commander in chief expands rapidly. Once let Congress by act declare war, and all measures taken by the president against the enemy are within his prerogative. Again the nature of the president's power varies both in kind and in extent as it is exerted upon soldiers or civilians, and whether it be in time of peace or in time of war. In time of peace the president has practically no power over civilians; while in time of war his powers may be greatly extended. His power over the enlisted forces, however, exists both in time of peace and in time of war. This is known as military law, and is derived from acts of Congress prescribing the methods of governing and regulating the army and navy.[3]

President's power on civilians or soldiers

President's power in time of peace

Although the power of the president as commander in chief in time of war and in time of peace is granted by the Constitution and has been upheld by the courts, it has been questioned in Congress. The latest instance was in 1907, when a resolution was introduced inquiring into President Roosevelt's action in discharging a company of colored troops for riotous behavior. The resolution led to an extended debate, which perhaps reflected certain personal and political prejudices, but in the course of which Senator Spooner set forth what seems to be the correct view of the president's power. He said in part:

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[1] See pp. 178–179.

[2] 158 U. S. 564, 582.

[3] See pp. 434–436.

Expounded by Senator Spooner

In our system the powers of government are distributed among three branches, each coordinate and independent of the other, neither of which is responsible to the other in any manner, except as prescribed by the Constitution. The President is not responsible under the Constitution to the Senate or to the House of Representatives or to both. . . .

. . . If a President, whether in his capacity of Chief Executive or as Commander in Chief has performed an act or made an order which was within his authority to make, I cannot see that it is competent for this body or the other, or both, to take testimony as to the wisdom of that executed act, upon which to determine whether it will by *legislative act set it aside*. The Congress, if dissatisfied, may withdraw the power or place additional limitations upon its exercise for the future, but I do not see that it can by legislation render void the act. When a power is possessed by the President or an officer of the government to do an act in a defined contingency or at his discretion, his discretion as to the existence of the contingency or that circumstances are such as to demand the performance of the act is conclusive, and the act cannot be impeached or overturned by Congress because in its opinion the exigency had not arisen or the power was unwisely exercised. The general rule is well stated by the Supreme Court in the case of *Martin* v. *Mott*, 12 Wheat. 19, thus:

> Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. . . .

The Constitution has left entirely without definition the scope of the power of the President as Commander in Chief, and the measure of the power was left to be sought elsewhere. I cannot agree that the sole constitutional power of the President is to command the army in time of war and conduct campaigns. That his power is vastly greater in time of war than in time of peace has been decided, and is not open to discussion. . . . But an army and navy must be commanded in time of peace, as well as in time of war, else neither would be fit for war. What the measure and scope of this power is in time of peace is not necessary at this time to discuss. That it is the power to command, with all that is inherent in the function and necessary to its exercise, cannot well be disputed, and that whatever the power is, is conferred by the Constitution and cannot be interfered with by Congress will not be denied.[1]

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[1] Congressional Record, January 19, 1907; quoted by P. S. Reinsch, Readings on American Federal Government, p. 22.

President's control over militia expanded by acts of Congress

These powers of the president are applicable to all military forces both in peace and in war. The president's control over the militia, however, is according to the Constitution to be exercised only when it is called into active service. Nevertheless, Congress by legislation in 1903, 1908, and 1916 vastly extended this power.[1]

War powers of president may be used by president before Congress declares war

In time of war the power of the president is greatly increased. War, however, must, according to the Constitution, be declared by Congress. Nevertheless, a civil insurrection may develop so rapidly that it becomes war before Congress can act. In such case the president alone without waiting for congressional action may assume the prerogative of his office as commander in chief in time of war. This actually happened in the Civil War and in the *Prize Cases* was sustained as follows:[2]

President the judge as to whether an insurrection has become a civil war

> Whether the president in fulfilling his duties, as commander in chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted.

President as commander may make war inevitable

So also by his power as commander in chief the president may actually take such action that war is inevitable, and Congress can do little but recognize the condition which has arisen. When war, however it may arise, once exists, the power of the president as commander in chief is far less subject to control than it is in time of peace.

In war president may use all means not forbidden by the Constitution or international law

In the prosecution of the war the president may utilize all means not expressly forbidden by Congress or international usage to weaken the enemy. Thus, to take a most famous instance: the property of the Confederates in their slaves was destroyed by the Emancipation Proclamation, itself an exercise of the war power. Constitutional guarantees do not operate within the enemy's territory. The conquering power ". . . may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war."[3] Even the usage of war may be overridden with the assent of Congress, as was shown by the confiscations made during the Civil War.

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[1] See pp. 425–428.

[2] 2 Black, 635, 670.

[3] *New Orleans* v. *Steamship Company*, 20 Wall. 387, 394.

Military government may be established by the president in hostile territory, foreign or domestic, in time of war

Military government may be established by orders of the president, both in hostile foreign territory or in hostile domestic territory, as a result or necessary consequent of war. In time of peace, also, military government may be established in foreign territory as a result of international agreement; but military government cannot be established by direction of the president alone in domestic territory in time of peace. In the first three instances the war powers of the president may be exerted to their limits. The military officials acting upon instructions from the commander in chief are supreme. The government is a military government. Its acts are acts of war reviewable by no court or civil authority. In *Dooley* v. *United States*,[1] the court held, with regard to the government of Porto Rico by the forces of the United States, as follows:

Powers of military government limited not by Constitution but by international law

> Upon the occupation of the country by the military forces of the United States the authority of the Spanish government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. . . . The doctrine upon this subject is thus summed up by Halleck in his work on International Law. . . . "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usages of the world, and confirmed by the writings of publicists and decision of courts — in fine from the law of the nations. . . ."

Practically the same power may be exercised by the president in establishing military government in domestic territory in time of war. It was so held in *New Orleans* v. *Steamship Co.*:[2]

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[1] 182 U.S. 222, 230, 231.

[2] 20 Wall. 387, 393.

Military government may be established in domestic territory in time of war

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the national government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war.

War powers cannot be used unless war exists, but president decides when a civil insurrection has become a civil war

It would appear, however, that these rights cannot be exerted unless war actually exists. In the case of a foreign war this is easy to determine, but there are greater difficulties in the case of a civil war. On this point the Supreme Court, in the *Prize Cases* already cited, said:

> A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. . . . It is not less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors.

Therefore, since domestic insurrections may assume the character of a civil war, and without the formal declaration by Congress war may exist, the president has the power to perform not merely the acts necessary to the conduct of the war, as has been shown, but also to establish military government in such domestic hostile territory. It is chiefly in this respect that his power to erect military rule in foreign territory differs from the same power to establish military government in domestic territory. A foreign war could hardly reach the stage where invasion and occupation would necessitate the establishment of a government before Congress would be called upon to declare war. Domestic insurrection, on the other hand, might become a civil war, and the president in the proper exercise of his discretion might assume the powers exercised in time of war. Among these is properly found the right to occupy and govern the hostile territory, although the same be domestic territory in which the inhabitants are in revolt.

Military government in time of peace

Military government may also exist in time of peace; but in the establishment of this and in its administration, the president acts not in the capacity of commander in chief but as chief executive. These governments in time of peace are discussed in the chapters on "National Defense" and "The Government of Territories."

THE PARDONING POWER

Among the specific powers granted to the president is the power "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." It is to be noted that there are two express limitations in this grant and that other limitations may be deduced from the system of the separation of powers.

No presidential pardon for impeachments

The first express limitation is in cases of impeachment. Here the action of Congress is plenary, although the sentence is limited to removal from office and disqualification from the future holding of office under the United States. Presidential pardons cannot mitigate such sentences. Impeachment proceedings are, however, no bar to further "indictment, trial, judgment, and punishment, according to law," and for sentences imposed as the result of such procedure a presidential pardon might be issued. Impeachment proceedings, however, are employed as much to remove an unfit man from office as to inflict criminal punishment which might be administered by courts of law.

No presidential pardon for offenses not against the United States

The other express limitation upon the pardoning power is that it can only be used for offenses against the United States. It therefore applies only to sentences which are or may be imposed by the federal courts, military courts, or courts-martial dealing with subjects expressly committed to them by the Constitution or acts of Congress. Presidential pardons cannot affect the sentence of a state authority.

No presidential pardon for contempt of court or Congress

The implied limitations are due to the theory of the separation of powers found in the Constitution. The judicial and legislative departments are coordinate with the executive department, and cannot be interfered with by the executive in the proper exercise of their functions. Thus both the courts and Congress have power to punish for contempt, by either fines or commitments, and to such punishments presidential pardons do not apply.[1]

Congress may pass acts of amnesty

Moreover, Congress evidently shares with the president the right to grant pardons, by act of immunity or amnesty. In *Brown* v. *Walker*,[2] in upholding the act exempting persons from any prosecution, on account of any transaction to which they might testify before the Interstate Commerce Commission, the Supreme Court said:

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[1] See W. W. Willoughby, The Constitutional Law of the United States, Vol II, p. 1270

[2] 161 U. S. 591, 601.

> Although the Constitution vests in the president "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction. . . .

Further, in the same opinion, the court said of amnesty:

> Amnesty is defined by lexicographers to be an act of the sovereign power granting oblivion, or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted.

Utilizing this power Congress has passed many acts granting immunity or amnesty, some of the more notable being those passed at the close of the Civil War and those granting immunity to the Mormons. A possible consequent of this power is that a Congress containing a majority of over two thirds hostile to the president might, by acts of amnesty passed over his veto, grant pardons in opposition to the wish of the executive.

Congress may vest pardoning power in some officer

Furthermore, Congress may vest in some officer other than the president the right to remit fines, forfeitures, and penalties imposed in accordance with law. Thus it was said in *The Laura*:[1]

> But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the Secretary of the Treasury and other officers, which has been observed and acquiesced in for nearly a century, is forbidden by the Constitution.

Congress may not limit the pardoning power of the president

Although Congress may pass a general or special amnesty act in harmony with or opposed to the wishes of the president, it cannot in any way, by legislation, limit or condition his right to issue pardons according to his own discretion. This pardon, moreover, may be full and complete, or partial, conditioned upon the performance of certain acts. A case of apparent encroachment upon the president's power occurred during the Civil War. In 1862 Congress passed an act authorizing the president to issue pardons to certain individuals upon certain conditions. This "suggestion of pardon by Congress, for such it was,"[1] was discussed in Lincoln's annual message in these words: "The Constitution authorizes the executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities."[2]

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[1] 114 U. S. 411, 414.

President Lincoln's view was furthermore upheld in the case of *United States* v. *Kline*,[3] where the court said:

Separation of powers makes executive and legislative independent of each other in pardons

> It is the intention of the Constitution that each of the great coördinate departments of the government — the Legislative, the Executive, and the Judicial — shall be, in its sphere, independent of the others. To the Executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences.
>
> Now it is clear that the Legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the court to be instrumental to that end.

And more briefly to the same effect in *Ex parte Garland*:[4]

> This power of the president is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

In the same case the effect of a pardon is thus defined:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases

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[1] *United States* v. *Kline*, 13 Wall. 128.

[2] Richardson, Messages of the Presidents, Vol. VI, p. 189; Benjamin Harrison, This Country of Ours, p. 143

[3] 13 Wall. 128, 147, 148.

[4] 4 Wall 333, 380.

Legal definition of a pardon

the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching, if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.[1]

While the effect of a pardon is to obliterate the offense, it does not operate to impair the rights of others; for example, to restore property the offender has forfeited, or to restore him to office.[2] Moreover, while the offender may, in the words of the court, be made a "new man," the pardon does not affect the fact that the offender has been convicted of a crime, and this fact may be taken cognizance of in estimating his character.

President may grant conditional pardons, reduce sentences, and grant reprieves

Since the president has the power to grant full and unconditional pardons, he has the power to grant conditional pardons, to reduce or commute sentences, and to grant reprieves or stays in the execution of the sentence.

Department of Justice advises president as to pardons

Applications for pardons are made either to the Department of Justice or directly to the president, who refers them to the department. The first step is to consult the judge and district attorney who tried the case in order to obtain from them any statement they may wish to make. The pardon clerk of the Department of Justice then makes up a brief of the papers and indorses his opinion upon them and sends them to the Attorney-General. He in turn examines the papers, makes any recommendation he thinks wise, and sends them to the president. The president examines the brief, may read the record of the case, and considers the recommendations of the other officials. His discretion, however, is absolute. Unlike the executives in certain states, the president is not assisted or restricted by the action of a council. When his decision is reached he indorses the papers "Pardon granted," or "Pardon refused," or "Sentence commuted to . . . ," and the papers are returned to the Department of Justice, which notifies the prisoner. Pardons, when granted, are issued by the Department of State under the Great Seal of the United States.[3]

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[1] 4 Wall. 333, 381

[2] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1171.

[3] See Benjamin Harrison, This Country of Ours, p. 147.

THE POWER OF THE PRESIDENT IN FOREIGN AFFAIRS

President has initiative except in formal declaration of war, and may oblige Congress to follow his policy

In determining the foreign relations of the United States the president is the dominating factor. His influence is both positive and negative. In every instance save the passage of a formal declaration of war the initiative lies with the president; while even in the case of a declaration of war the president, through his veto power and his power as commander in chief, could check any action which Congress might wish to take. Furthermore, although the president is dependent upon Congress for the fulfillment of a policy he has initiated, Congress is by no means free to act. In most instances the president may take independent measures, which will oblige Congress to adopt his course. To take but a single example, the president, through his power to recognize revolting colonies, may precipitate a war which Congress could not avoid. Great as are the powers granted to the president by the Constitution, modern political and international conditions tend to leave the exercise of these powers almost entirely to the discretion of the president unchecked by congressional control.

Sources of president's power in foreign affairs.

The influence of the president in foreign affairs comes from four sources: his power as commander in chief of the military and naval forces, his appointing power, his power to negotiate treaties, and the power he exercises as chief executive of the United States in enforcing the laws.

(1) Commander in chief of the army and navy

As commander in chief he has full power to utilize all the military and naval forces of the United States according to his own discretion. Thus the war with Mexico, declared by Congress to have been caused by Mexico, was in reality caused by the act of President Polk in sending troops of the United States into disputed territory. So also President Wilson in 1913, 1916, and 1919 employed force against Mexico without a formal declaration of war.

(2) Appointment of ambassadors

[Involves recognition of independence]

The power of the appointment of ambassadors, ministers, and consuls means far more than the choice of proper men for the diplomatic service, important as that is. It means a recognition of the independence of a country. Since a parent state is always loath to concede the independence of a revolting community, premature recognition may be regarded as an unfriendly act, if not a positive intervention in the war. So, too, recognition of a state of belligerency is entirely in the hands of the president, and the possible problems arising must be solved by Congress, which had taken no part in determining such a course.

[Reception of ambassadors]

Not only the appointment of the ambassadors of the United States but the question of the reception of ambassadors from other countries is in the hands of the president. With the right of reception goes the power of dismissal. This last right has been invoked several times, twice against England, and most recently against Germany. While the refusal to receive an ambassador or the dismissal of an envoy does not necessarily lead to war, it produces such strained relations that war may easily develop.

(3) Negotiation of treaties

The Constitution gives the president the sole power to negotiate treaties. The initiative is his, and Congress cannot of itself make a treaty without his consent. Thus it might well happen that in the opinion of Congress a treaty would seem highly desirable, — for example, a treaty to end a war, — but unless the president thought it wise to negotiate and lay before the Senate such a treaty, Congress could take no action. Conversely, the Senate may refuse to concur in a treaty negotiated by the president. In fact, no treaty is legally binding unless two thirds of the Senate accept the same. Hence, as a measure of prudence, the president generally attempts to find out the sentiments of the Senate before entering into negotiations.

(4) General executive power

As general executive of the United States the president enforces both the domestic laws of the United States and international law. These systems affect both citizens and foreigners. The extent to which the president shall go in affording protection to American citizens abroad and upon the high seas is a difficult question to determine, as is also his action concerning foreigners temporarily domiciled in the United States. When war breaks out between two nations the president usually issues a proclamation of neutrality, calling the attention of United States citizens and foreigners resident here to the existence of certain statutes prohibiting certain kinds of acts. But the enforcement of these laws is in the hands of the president. He may enforce them equally against both belligerents, or show favoritism to one, or display general laxity toward both. He may thus subject the United States to claims for damages from one or both belligerents or even give excuse for reprisals or possibly for war.[1]

Action of Congress necessary to perfect president's policy

Thus, although the power of Congress or the Senate is necessary to perfect the action of the president in almost every instance, by way of consenting to appointments, ratification of treaties, making of appropriations, and the passage of legislation, the president possesses the initiative and is the dominating factor. Because of this vast power his political influence is greatly increased. In a war in which the United States is a belligerent the power of the president is almost unlimited. Although party wrangles may be temporarily silenced, they are sure to break out again, but with little hope of success. Congress may oppose and even pass hostile legislation, but in the conduct of the war and the settlement of foreign affairs the president can hardly be permanently thwarted.

THE LEGISLATIVE POWER OF THE PRESIDENT

In spite of the theoretical separation of the departments of the government, two legislative functions were given to the president. These are the qualified veto and the right to recommend action.

The president in a position to make recommendations to Congress

The advantage of allowing the president to make recommendations and to supply Congress with information is obvious. As executive, the president has at his disposal more information concerning both foreign and domestic affairs than Congress can hope to gather. The executive is in a better position than either the legislative or judicial departments to know the actual working of the laws, to appreciate the needs of the military, naval, and civil branches, to make recommendations concerning finance, and to perceive the necessities for legislation.[2] It was perhaps in keeping with the ideas of the framers of the original functions of the presidency that, as political leader, he should recommend the adoption of the measures he thought necessary.

Acting upon this power the president transmits to Congress many messages of various characters at frequent intervals. In

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[1] For a more extended treatment of these subjects see p 559.

[2] J. Story, Commentaries (5th ed.), Vol. II, p. 382.

Messages of the president for the purpose of

(1) comprehensive summary

(2) special occasions

(3) veto

(4) arousing public opinion

the popular mind, however, the president's message usually means the long and comprehensive summary which the president sends to Congress at the opening of each session. This is but one type of message. Special messages concerning matters which the president deems important are frequently sent, as the need arises. The disapproval of bills is transmitted by means of messages. And, finally, executive communications are made to Congress, not so much for the purpose of giving information or recommending legislation, as to arouse or solidify public opinion upon problems which in some cases are entirely outside of legislative action.

Presidential address as compared with presidential message

Washington and John Adams at the opening of each session of Congress addressed the House and Senate in joint session. Jefferson, however, abandoned this plan, but it was revived by Wilson in 1913. A presidential address has both advantages and disadvantages over a written message read by one of the clerks of Congress. An address emphasizes the personality and the personal opinions of the speaker to a greater extent than does a message. It may strengthen the feeling of personal leadership. It is generally comparatively short and thus makes a deeper impression than the long, comprehensive, written message. On the whole it attracts more attention throughout the country and is more likely to be printed in full. On the other hand, the personal address, while perhaps arousing enthusiasm, solidifies opposition and invites personal reply and criticism to a greater degree than a printed message, which might be laid upon the table and referred to a number of committees. In those countries where parliamentary government exists, where the executive is a part of the legislature and dependent upon its will, the executive may properly utilize his personality to answer criticism, offer explanations, and persuade the legislature to adopt his proposals. In the United States, however, where the president holds office independently of Congress, and where the legislature is peculiarly jealous of executive interference, there is less justification for the use of personal influence and more danger in attempting it. Nevertheless, President Wilson has undoubtedly greatly strengthened his position, in both Congress and the country at large, not merely by the character of his messages but by their delivery in person.

Message not the work of the president alone

The preparation of the message is not the work of the president alone. The long, printed documents, designed to give comprehensive information of the condition of the government, were frequently compilations of the reports of the various departments. Even some of the more specialized messages have been claimed to be the product in thought or phraseology of others than the president. Thus J. Q. Adams is held by some to have been the author of the Monroe Doctrine, Livingston is supposed to have phrased many of the messages of Jackson, and Olney is claimed to have had a large hand in the preparation of Cleveland's famous Venezuela message. The veto messages are furthermore frequently the result of the advice of the department concerned, or, in cases of the constitutionality of a bill, of the Attorney-General.

Public as contrasted with legislative purpose of message

(1) in foreign affairs

[The Monroe Doctrine]

[The Venezuela message]

[Wilson's messages during the World War]

(2) in domestic affairs

One use of the message of the president is becoming increasingly important: that is, the public as contrasted with the legislative purpose. Foreign countries might properly take exception to legislative action, but no just criticism can be made of the president's discussion of any matter with Congress. Thus Monroe, in a manner beyond all criticism, served notice upon both Russia and Spain that the Americas were not open to further colonization. While the Venezuela message of President Cleveland, although arousing criticism as to its advisability, was unexceptionable from a diplomatic point of view, and accomplished what diplomatic protests had failed to obtain. In like manner, before the United States entered the war, President Wilson informed both the belligerents and his countrymen of the position and policy of the United States, and by his speeches brought about a somewhat clearer definition of the aims of the war and the policies to be pursued when peace should be established. So, too, he was tacitly accepted as the spokesman of the Allies, and by his address of January 2, 1918, laid down conditions upon which the Allies were supposed to be willing to conclude peace. In domestic affairs the message of the president is often of great importance. It advertises to the country his position and his policies. Although these are not always the policies of Congress, the general public is more inclined to pay attention to the declaration of the president than to the utterances of local politicians. With this power, the president can at times arouse public opinion to such an extent that he can compel Congress unwillingly to do his will. While president, Roosevelt utilized his messages to arouse the moral sentiment of the country upon questions which were sometimes entirely outside the sphere of congressional legislation.

The veto power

The president's qualified veto came directly from a similar power possessed by the colonial governors. In England, while the Crown may in theory retain this right, it has been lost by custom through the development of the cabinet system. Not since 1707 has an English sovereign refused to assent to an act of Parliament. It is far otherwise in the United States, where, instead of criticism, popular approval has followed the increasing use of this power.

The president's veto not absolute

It is to be noticed that the veto of the president is not an absolute one. According to the Constitution he may at any time within ten days return a bill which does not meet his approval, stating the grounds for withholding his assent. Should both Houses repass the bill by a yea-and-nay vote by a majority of two thirds, the act becomes a law without the signature of the president. If the president neither signs the bill nor returns it within ten days with his objections, it becomes a law as if he had signed it. But all legislation passed during the last ten days before the expiration of Congress is open to the absolute veto of the president. This is because the president may withhold his veto until Congress has adjourned and the opportunity to override his objections has been lost. This "pocket veto," as it is called, has been criticized. It is evident that it gives the president the opportunity to thwart the wishes of the legislature expressed in an even more emphatic manner than the two-thirds vote necessary to overcome the objections of the president. On the other hand, it serves as a check upon hasty and ill-considered legislation which might be hurried through in the press of business on the last days of Congress. On the whole it has not been abused; nor has it been used to a very great extent except in the administration of Johnson, when the president and Congress were at odds over the problems of reconstruction.

Exception in case of the "pocket veto"

The veto was designed, according to "The Federalist," first, to protect the executive power from encroachment by Congress, and

Original purpose of veto to protect executive and prevent hasty legislation

second, to prevent ill-advised and hasty legislation. Down to 1860 the vetoes, less than fifty in number, were generally upon constitutional grounds, although from the administration of Jackson, vetoes because of expediency were not uncommon. But the executive, except in the days of the reconstruction controversy, seldom needed protection. The Civil War settled many constitutional questions and gave the government many powers which were formerly in dispute. With this constitutional change the use of the veto was also changed. It is now generally conceded that the president vetoes a measure which he thinks objectionable either in principle or probable results. Questions of constitutionality are secondary to those of expediency.

Present use of veto

Veto not used frequently

The veto has not been used frequently, considering the multitude of bills presented to the president. Down to 1889 out of 22,650 bills, acts, and joint resolutions which Congress had presented since the organization of the government, the president had signed 21,759 and vetoed 433.[1] Of these, Cleveland alone vetoed over half, chiefly private pension bills. Congress has passed thirty-two bills over the president's veto, fifteen of which were in the administration of Johnson. Seven presidents[2] did not use the veto. To date, the veto power has probably been used less than six hundred times.

Bills seldom passed over president's veto

The use of the veto has generally met with approval. The president has frequently better interpreted the public demand than has Congress, and the people have occasionally welcomed protection from their own elected representatives. It has limited to some extent unwise extravagance and has prevented the passage of some legislation which from its character might never be tested in the courts. It has been used with discretion by the president, as is shown by the fact that only rarely has Congress succeeded in overriding the president's objections.[3]

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[1] E. C. Mason, The Veto Power, Appendix D. See also J. H. Finley and J. F. Sanderson, The American Executive and Executive Methods, pp 72–81, 206–217; C. A. Beard, American Government and Politics, pp. 201–204.

[2] John Adams, Jefferson, J. Q. Adams, William H Harrison, Taylor, Fillmore, and Garfield.

[3] The first instance occurred in Tyler's administration; Pierce was reversed 5 times; Johnson, 15; Grant, 4; Hayes, 1; Arthur, 1; Cleveland, 2; Taft, 2; Wilson, 2. — E. C. Mason, The Veto Power, Appendix D

In recent administrations presidents, by letting Congress know that they would veto an act unless altered to their satisfaction, have succeeded in writing their ideas into legislation in ways perhaps not contemplated by the Constitution. But this is only an illustration of the changed position of the executive and an example of his position as the leader of his party.

CHAPTER IX

THE ADMINISTRATION

THE PRESIDENT'S CABINET [1]

The cabinet in the United States unlike the English and French cabinets

Technically, the term "the administration" in American government includes the president and the heads of the departments comprised in the informal body known as the cabinet. The meaning of the term "cabinet" in the United States differs from that in other countries. In England, France, and the self-governing colonies of Great Britain the cabinet is a body of officials, nominally appointed by the head of the State, but actually responsible to and holding office by the consent of the legislature. Like cabinets in other countries the cabinet in the United States is composed of holders of offices which are created by the legislature. These officers are also appointed by the president. But unlike the cabinets of all other countries the cabinet officers in the United States have no political responsibility to the legislature. They are not even indirectly chosen by it, and, save in so far as the Senate consents to the nominations of the president, they have no responsibility to the legislature but are solely responsible for all their discretionary acts to the president. Although the theory of the separation of departments is held in other countries, the parliamentary system, by which a cabinet, controlled by the legislature, directs and performs all executive acts, has resulted in the supremacy of the legislature. This is not so in the United States. The cabinet in the United States is not a cabinet in the European parliamentary sense, but merely a group of officials subordinate to the chief executive, who is charged with executing the laws of the United States. Congress can by legislation control and decide what shall be done, but not how it shall be done — that is the essence of the discretionary or political power of the executive, over which Congress has no control.

In the United States the cabinet is a body of officials responsible to the president

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[1] See H B. Learned, The President's Cabinet; M. L. Hinsdale, A History of the President's Cabinet.

Origin of the cabinet in the United States

In the convention of 1787 it was several times proposed that the president should be given a council analogous to the Privy Council in England; but these suggestions were fortunately abandoned. Nevertheless, in the Constitution as it came from the framers there were two points from which such an advisory council might have developed. The first was the Senate, which with the president shared the executive power in making treaties and confirming appointments. But the early experience of Washington and the difficulties he encountered in dealing with that body checked the development along that line. A second and more likely element from which an advisory council might have developed was the heads of the executive departments. As has been shown, the power to create such departments was given to Congress, and the necessity of those close relations to the president was recognized by the provision that he might require their opinions. But it was left entirely to his discretion as to the form these relations should take, whether by formal reports, or whether the heads of the departments should sustain more intimate relations to their chief. The cabinet as council, that is, as a body of intimate, trusted political advisers, was not established by the Constitution, but owes its existence to unwritten law and custom.[1]

Constitutional provisions for the formation of the cabinet

The constitutional provisions for the powers from which the cabinet has developed are found in the general grant of the executive power to the president,[2] and the power expressly granted to him to consult the heads of the executive departments;[3] while the fact that such departments are to be created is implied from the last quoted clause and also from the power given to Congress to make all laws necessary and proper to carry out the powers vested by the Constitution in the government of the United States or in any department or officer thereof.[4]

Growth of departments

Acting on this authority, Congress, at its first session in 1789, passed statutes creating three executive departments: the Department of Foreign Affairs (which was soon to become the Department of State), the Department of War, and the Treasury

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[1] M L Hinsdale, A History of the President's Cabinet, pp. 7–8.

[2] The Constitution of the United States, Article II, Sect. i.

[3] Ibid. Article II, Sect. ii, clause 1.

[4] Ibid. Article I, Sect. vii, clause 18.

Department. A little later it created the office of Attorney-General, which was organized as the Department of Justice in 1870. This process of congressional creation and division has continued until to-day there are ten principal departments.

Heads of departments become the cabinet

The chief officers of the three earliest departments, together with the Attorney-General, were consulted by Washington, and in 1793 were known unofficially as the cabinet, a title which was not recognized by law until 1907.[1] The precedent established by Washington has been followed ever since, with the exception of a short period during the administration of Jackson, when he consulted other advisers than the heads of the departments. In recent years cabinet meetings have been held twice a week, on Tuesday and Friday, which are known in Washington as "Cabinet Days."[2]

Members of cabinet are from party of the president

The principles governing the selection of the cabinet reflect the dual position of that body. The officials must be able to administer the affairs of the departments over which they preside; but they must also be suitable advisers for the president in the important policies of his administration. The first principle which has been followed ever since Washington's second administration is that the cabinet officers must come from the same political party. The blurring of party lines, or the disintegration of parties, has produced a few exceptions, notably in the administrations of Monroe, Tyler, and Lincoln, and certain cases of independence of party allegiance have accounted for some individual appointments. The appointment of Gresham as Secretary of State in 1893, after he had been a member of Arthur's cabinet and a strong candidate for the Republican nomination in 1888, is the most remarkable instance. In recent years, however, the claim of the Republican party to be a truly national one led both President Roosevelt and President Taft to include in their cabinets Southern Democrats for brief periods.

Exceptions

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[1] H. B. Learned, The President's Cabinet, pp. 157-158.

[2] Twice during the administrations of President Wilson it has been reported that the formal cabinet meetings were discontinued. This was probably for other reasons than those which actuated Jackson, for there is little evidence that President Wilson has preferred other advisers to the heads of departments, although he has freely consulted a large number of unofficial advisers It is more probable that the complications of the war could best be handled by private conferences with the heads of the departments concerned.

Sections of country recognized in selection

A second principle usually followed is a geographical one. It has been held advisable to give recognition to all sections of the country. Thus, President Wilson's original cabinet contained members from eight different states, but in making these appointments he violated another principle formerly insisted upon; namely, that no state should have more than one member. This was first most clearly violated by President Cleveland, who made two appointments from New York, which also furnished the president. Since 1884 there have been other cases of double appointments from the same state, and President Wilson's first cabinet contained three secretaries from New York, a fact which caused some unfavorable comment.

Political strength and personal friendship

Three other motives for choice seem to be operative at present. The most obvious one is the necessity of gaining political support and strength for the administration. A striking instance was President Wilson's appointment of Mr. Bryan as Secretary of State, thereby winning for the administration the support of the more radical wing of the Democratic party. Personal friendship frequently plays a great part in some appointments. For example, President McKinley appointed his friend and neighbor, W. R. Day, Secretary of State, a choice which proved a not unhappy one. Perhaps also the promotion of Mr. Cortelyou from the position of secretary to the president to secretary of the Departments of Labor and Commerce, Post Office,.and Treasury by President Roosevelt was of the same sort, although in this instance ability and tested political capacity were doubtless the most decisive motives.

Skill in administration

The third tendency and the last to develop in point of time is the attempt to select men who are distinguished for their skill in administering large professions or business interests. Harrison's appointment of Wanamaker is a case in point, although the idea of rewarding a successful campaign manager may not have been absent. Clearer cases are seen in the appointment of Root to reorganize the War Department, and Lyman Gage as Secretary of the Treasury by McKinley, while success in academic administration is recognized by President Wilson, himself an ex-college president, in the appointment of Secretary Houston, who had been the successful president of three institutions.

Relation of president to cabinet

The relation of the cabinet to the president has varied. During the administration of Jackson the presidential power was almost military and the secretaries were treated like orderlies, while during the last months of Buchanan's administration the presidential power may be said to have been in commission.[1] Between the two extremes the more normal status is found. Legally the relations of the secretaries to the president are well stated as follows:

> What we call the cabinet is, therefore, a purely voluntary, extra-legal association of the heads of the executive departments with the president, which may be dispensed with at any moment by the president, and whose resolutions do not legally bind the president in the slightest degree. They form a privy council but not a ministry.[2]

While this correctly states the legal and theoretical position and relation of the cabinet to the president, political considerations, the growth of public business, and precedent greatly strengthen the cabinet's position and influence.

Cabinet meetings informal

The meetings are most informal, resembling the discussions of boards of directors. No minutes are preserved and seldom is there a formal vote taken. Nevertheless, the subjects of the discussion are of vital importance, not merely to the departments but to the legislative program with which Congress is dealing, and for the political position and influence of the administration. It is the custom for each secretary to consult with the president before introducing measures at a cabinet meeting and to follow the president's suggestion. No policy could be adopted without the approval of the president. Nevertheless, there is probably a free interchange of opinion, and either in the cabinet meeting or in private discussion compromises are arranged. While each secretary is responsible for the administration of his department, questions involving important changes of policy are almost invariably presented to the president and often for discussion at the cabinet meeting. Even the routine administration of the department may sometimes produce a political crisis which necessitates presidential interference or cabinet consultation.[3]

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[1] M. L. Hinsdale, A History of the President's Cabinet, pp 333, 334.

[2] J. W. Burgess, Political Science and Comparative Constitutional Law, Vol. II, p. 263.

[3] For the Diggs case in California, see p 217 note.

Legislative program discussed by cabinet

At the meetings the message of the president is discussed before it is presented to Congress, and the legislative program is prepared. In this particular it would seem as if the cabinet was departing from the strictly legal functions of an executive body, and beginning to resemble the cabinets of England and France. Such action, however, is entirely extra-legal and foreign to the original conception of the duties of the heads of the departments, but finds its justification from the fact that the president is directed to recommend measures to Congress for consideration, and is vested with the power of veto. The cabinet, acting not so much as heads of executive departments as confidential advisers of the president, is therefore justified in taking legislative policies into consideration. Such action does not always please Congress, and the fact that during recent administrations bills have been frequently prepared by cabinet officials and presented after discussion in the cabinet has been regarded by Congress as executive interference with the proper functions of the legislature.

Political influence of cabinet members

But cabinet meetings serve another purpose. As has been shown, the cabinet officers are sometimes chosen because of their political influence. As politicians they keep the president informed concerning the public opinion of the administration. As leaders of local if not national importance they frequently explain and justify the policy of the administration through speeches in various parts of the country. And in their relation to Congress their political influence is often invaluable in bringing pressure to bear upon recalcitrant members of the party, thus facilitating the legislative program of the administration.

The cabinet still the president's council and not a "responsible ministry"

The importance of the cabinet as a council has increased, but there has been little development of its functions. The individual members are still subordinate officials chosen by the president to carry out his policies, and are still responsible to him. Their influence with Congress still depends upon the political strength of the administration exerted in an entirely extra-legal way, and no steps have been taken to develop their functions into those of responsible ministries of foreign countries.

THE POWER OF THE PRESIDENT TO DIRECT ACTION

Dual position of members of cabinet

The members of the cabinet occupy a dual position. They are officers of the United States having specific duties to perform, which are minutely defined by the statutes creating the offices they occupy. They are also confidential subordinates of the president. As has been shown, the heads of the departments are appointed by the president with the advice and consent of the Senate, and are removable only by the president except in case of impeachment. At the same time it must be remembered that like the president they are officers of the United States and possess very definite duties and powers.

Their theoretical position was thus stated by the Supreme Court in 1838:

Position as stated by the court

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility are subject to the control of the law, and not to the direction of the president. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.[1]

Position as stated by statesmen

Nearly a generation later John Sherman, himself a former Secretary of the Treasury, thus stated the power of the president to direct and control the actions of his subordinates:

> The president is intrusted by the Constitution and the laws with important powers, and so by law are the heads of departments. The president has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. It is especially the custom of Congress to intrust to the Secretary of the Treasury specific powers over the currency, the public debt, and the collection of the revenue. If he violates or neglects his duty he is subject to removal by the president, or impeachment by the House of Representatives, but the president cannot exercise or control the discretion reposed in the Secretary of the Treasury, or in any head or subordinate of any department of the government.[2]

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[1] *Kendall* v. *United States*, 12 Peters, 524, 610

[2] John Sherman, Recollections, Vol. I, p 449.

In actual practice president through power of removal may direct action of all cabinet officers

Although the opinion of the court and the logical argument of Mr. Sherman set forth the legal theory, the practice of the government has been far different. As has been shown, the president possesses the power of appointment and removal of all officers except the judges. Although this power of removal has been technically and formally invoked against cabinet officers only twice,[1] yet resignations, transfers, and promotions have accomplished the same result. In fact, at the very time when the court was asserting the inability of a president to direct the head of a department, President Jackson by a series of removals was vindicating his right to impose his policy upon the Secretary of the Treasury. Although the Senate refused to confirm the appointment of Taney (the secretary who finally carried out Jackson's policy) and passed a vote of censure upon the president, yet the success of the president so clearly showed his resources that his power has never since been questioned. So clearly was this recognized that Congress, in order to insure the sympathetic administration of its reconstruction policy, passed the Tenure of Office Act to prevent the removal of Stanton and the appointment of someone else more compliant with the directions of the president. The speedy amendment and final repeal of the act have now restored the president to the position he formerly occupied.

Technically two classes of cabinet officers

The members of the cabinet are sometimes divided into two classes, a division based upon the relation to Congress shown in the acts which create their offices. The Treasury and Post-Office Departments were organized without reference to presidential control, and their heads report to Congress directly. In the Departments of State, War, and Navy the power of presidential direction is recognized, and it is implied in the other departments. Certain secretaries of the Treasury and some writers have professed to see in this difference a wider measure of independence of presidential control for the Secretary of the Treasury and the Postmaster-General than exists for the other officials. Although this may be technically true, practically there has never been any difference as to the power of the president to enforce his will upon any of the heads of the departments,

Practically both subject to direction of president

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[1] M. L. Hinsdale, A History of the President's Cabinet, p. 223.

and it is significant that the triumph of Jackson came at the expense of a Secretary of the Treasury.

Two classes of duties performed by cabinet officers

Each cabinet official occupies a dual position and performs two kinds of duties: One class which may be called political is absolutely under the direction of the president, and there is no power which can interfere with such actions. But there are other acts, duties which are prescribed by statute and known as administrative or ministerial acts, of which the courts will take judicial notice and may compel action. In the great decision of the Marbury case, Marshall laid down the clear distinction between these classes which has been followed ever since. At the close of the administration of John Adams certain commissions which were already signed had not been delivered. William Marbury, to whom a commission for a justiceship in the District of Columbia had been issued, attempted, by a writ of mandamus, to compel the Secretary of State, Madison, to deliver the commission which was withheld at the direction of President Jefferson. A clearer case of conflict could hardly be imagined, for of all the cabinet officers the Secretary of State has the closest relation to the president and is most subject to his control. Was the delivery of the commission a discretionary and political duty or purely an administrative and ministerial one, not subject to the direction of the president? Although the writ was not granted for want of jurisdiction, yet Marshall in an obiter dictum held that the contention was a proper one which might be upheld in a proper court. His reasoning is as follows:

In political or discretionary acts the decision of the executive is conclusive

> By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
>
> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. . . .

For ministerial acts the executive is responsible at law

> But when the legislature proceeds to impose on that officer [the Secretary of State] other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

Discretionary acts examinable only politically

> The conclusion from this reasoning is that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[1]

Ministerial acts examinable by the courts

In 1866 the court gave the following briefer yet more comprehensive definition of ministerial duties:

> A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.[2]

The rule appears to be that over discretionary or political acts the courts will take no jurisdiction. The president is responsible to the electorate, not to Congress nor to the courts. Nor will the courts take any cognizance of the discretionary or political acts of the subordinates; they are responsible solely to the president and carry out his directions. With regard to ministerial duties, however, another condition prevails. These acts are required by law, and the courts will by appropriate means compel their performance even against the orders of the president. Yet since the president has in his hands the absolute and unrestricted power to remove any officer, he may place his subordinates in the uncomfortable dilemma of facing either a legal prosecution or removal. The most extreme statement of the president's power is found in the following opinion of Attorney-General Cushing, who in 1855 wrote:

Power of president may force a dilemma

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[1] 1 Cranch, 137, 165, 166.

[2] *Mississippi* v. *Johnson*, 4 Wall. 475, 498.

Extreme statement of president's power

I hold that no head of a department can lawfully perform an official act against the will of the president, and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the government and change it into a parliamentary despotism like that of Venice or Great Britain, with a nominal executive chief or president utterly powerless — whether under the name of Doge or King or President would then be of little account so far as regards the maintenance of the Constitution.[1]

The so-called elastic clause of the executive article which directs the president to take care that the laws be faithfully executed increases the power of the president to direct the action of other departments. For example, in the Debs case[2] it was held that he might direct the use of United States troops to facilitate the transportation of the mails and interstate commerce, and in the Neagle case[3] that the president might take means for which no law existed to protect the judges in the exercise of their functions. Other examples might be cited to show that the responsibility for the enforcement of the law enables the president to control at his discretion and to a very large degree the action of all officers.

Increased size of cabinet limits president's personal control

With the increased size of the cabinet and the rapid and vast extension of governmental activities the president's ability to direct and control has necessarily somewhat declined. The very multiplicity of public business makes it impossible for any one person to assume direction over the whole field. Consequently, more and more, the departments are becoming self-contained, and as the president's knowledge of what is being done diminishes, his control declines. Yet at any moment a matter decided by a department head in the ordinary routine of the business of his department may become a matter of public concern and require presidential action. At such times it becomes evident that although the constancy of the control has diminished, the power to reverse or overrule remains.[4]

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[1] J. A. Fairlie, The National Administration of the United States of America, p. 19, quoting 7 Atty-Gen. Opin. 453, 470. [2] See p. 60. [3] See p. 178.

[4] In 1913 the Attorney-General consented to the postponement of the trial of a criminal case in California The United States District Attorney in charge of the prosecution resigned by way of protest. Public opinion became excited, and President Wilson, after discussion of the matter in cabinet meeting, directed that the prosecution should continue.

CONGRESSIONAL CONTROL OF EXECUTIVE DEPARTMENTS

Departments created by Congress

The ultimate source of the power of all the executive departments is found in statutes. The powers and duties of the president alone of all executive officers are defined by the Constitution — all other officials owe their existence and their power to acts of Congress. By the clauses of the Constitution already quoted, Congress is given implied power to create and define the duties of such departments. Acting upon this, Congress has since 1789 created ten departments. The statutes creating these departments necessarily define the duties of their heads, and as the number of departments has increased there has been a transfer of power from one department to another. For example, the Treasury Department at one time performed many of the duties which in 1849 were transferred to the Department of the Interior, while in 1903 the Departments of State and of the Treasury surrendered certain functions to the Department of Commerce and Labor, which in turn was divided into two departments in 1913.

Functions and duties of departments determined by Congress

In the creation of these departments and the definition of their duties Congress is supreme, subject of course to presidential veto. Thus in 1913 the new Department of Labor was created in spite of the opposition of President Taft, who, however, forbore to exercise his veto, out of deference, it is said, to the wishes of his successor. In thus creating new departments there is not merely a new distribution of powers and functions — sometimes not to the efficient or economical advantage of the service — but also an exercise of congressional control. The statutes go into minute details and directions and prescribe not merely what shall be the functions of the department, but often the specific acts which shall be performed. In other words, the statutes prescribe a large number of ministerial acts over which the president has little control. Congressional control may be carried further by subsequent legislation.[1]

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[1] In the prosecution of the war President Wilson found himself so hampered by the ironclad organization of some of the departments, that Congress passed an act authorizing the president to coordinate or consolidate executive bureaus, agencies, and offices, in the interest of economy and the more efficient conduct of the government. — May 20, 1918, Public Act No. 152, 65th Cong.

Congress may control through appropriations

But aside from general statutes and particular acts Congress exercises constant control through appropriations. This control is exercised positively by making appropriations for certain projects which the departments may or may not have recommended, and by prescribing conditions under which the appropriation shall be used. Negatively congressional control is exercised by reducing or failing to appropriate for the plans recommended by the department. Sometimes the vicious practice of attaching general legislation to appropriation bills is resorted to in order to insure the passage of a particular measure. This method of legislation by "riders" was freely employed during the administration of Andrew Johnson, but was checked in 1879 by President Hayes, who vetoed all the appropriation bills to which riders were attached. In recent years, however, the practice has been revived, and in 1912 President Taft vetoed two appropriation bills declaring that "the importance and absolute necessity of furnishing funds to maintain and operate the government cannot be used by the Congress to force upon the Executive acquiescence in permanent legislation which he cannot conscientiously approve."[1]

["Riders"]

[Restriction on use of appropriations]

The policy of various departments, however, may be to a large extent controlled by restrictions placed upon the appropriations made for it. For example, the Navy Department was prevented from carrying out what were reported to be the directions of the president by the following proviso attached to an appropriation bill:

> That no part of the appropriations herein made for the Marine Corps shall be expended for the purposes for which said appropriations are made unless officers and enlisted men shall serve as heretobefore on board of all battleships and armored cruisers, and also upon such vessels of the navy as the president may direct, in detachments of not less than eight per centum of the strength of the enlisted men of the navy on said vessels.[2]

In the naval appropriation bill for 1914 the policy of the department regarding the purchase of powder was controlled by the insertion of this proviso:

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[1] Congressional Record, Vol. XLVIII, p. 11025, August 15, 1912.

[2] U.S. Statutes, Vol XXXV, chap 255, pp. 773-774

> That in the expenditures of this appropriation, or any part thereof, for powder, no powder shall at any time be purchased unless the powder factory at Indian Head, Maryland, shall be operated on a basis of not less than its full maximum capacity.[1]

In the appropriations for naval vessels restrictions are found frequently directing the building of certain vessels in navy yards or upon the Pacific coast, and requiring contractors to conform with the eight-hour law for laborers.[2]

Congress may also take more affirmative control over the policy of a department by appropriating money for some specific object; for example, the free distribution of seeds or the improvement of certain rivers and harbors.

Methods by which Congress obtains information

Information concerning the departments is brought to the attention of Congress through the reports made by the head of each department to the president, and by him transmitted to Congress with recommendations. In addition, any member of Congress may ask informally for information, which as a matter of courtesy is usually furnished. More formal are the resolutions of either House calling upon the heads of the departments to answer questions or to furnish information. There is, however, no method of enforcing compliance with the request, for the president may direct the officer to refuse to give the desired information and Congress is helpless.[3] Most formal of all are the committees appointed to investigate the conduct of either the president or some of his subordinates. Here again the executive may refuse to appear or to answer questions and may direct his subordinates to do likewise, although as a matter of political expediency such a course is seldom pursued. Finally, there is the cumbersome and seldom-used method of impeachment by which Congress can cause the removal and punishment of any executive officer.

President may direct department to refuse

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[1] U. S. Statutes, Vol. XXXVII, Part I, p. 896.

[2] Ibid. Vol. XXXV, pp 35, 158; Vol. XXXVI, p. 628.

[3] See the case of Cleveland, ante, p. 188. Also the following extract from a message of President Roosevelt, January 6, 1909: ". . . I feel bound, however, to add that I have instructed the Attorney-General not to respond to that portion of the resolution which calls for a statement of his reasons for non-action. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department or to demand from him reasons for his action." — Congressional Record, Vol. XLIII, Part I, p. 528

Congressional control absolute over ministerial acts but not over discretionary acts

Taken as a whole, the control which Congress exercises over the cabinet is not so great as is exercised by the English House of Commons. From our system of government this must be evident. In the English system of parliamentary government the executives are absolutely responsible to Parliament, not merely for their administrative or ministerial acts but for their political or discretionary acts as well. At any moment a hostile vote in the House of Commons may force the resignation of the executive. Not so in the United States. Congress has absolute financial control down to the smallest details, and by statutes can to a very great extent control the ministerial acts of the executive; but for its political acts, its spirit and policy, the executive is responsible not to Congress but to the electorate. The president is irremovable, save by impeachment, and his officers hold their positions during his pleasure. For Congress to attempt to control the discretionary or political policy of the administration by cutting off supplies and so stopping the operations of the government would probably meet with the political disapproval of the people. In the separation of powers as developed in the United States the executive cannot be forced by the legislature, although Congress may hamper and refuse to appropriate funds for his policies. The possibility of a deadlock is always present, but political adjustments are usually made and a compromise accepted.

THE CIVIL SERVICE

Civil service defined

The civil service is defined as the executive branch of the public service as distinguished from the military, naval, and judicial. Before the World War the total number of officers and employees of the United States was estimated at over five hundred thousand, not including military or naval forces; while in the civil service as defined above there were approximately four hundred thousand. This great army of civil employees and officers are all appointed, either by the president alone (36), or by the president with the advice and consent of the Senate (10,395), or by the heads of departments or their subordinates. Those appointed by the president with the assent of the Senate are known as presidential officers and include the heads of the departments, their assistants, postmasters of all but the fourth class, collectors of revenue, and heads of all local departments outside of Washington, chiefs of bureaus and divisions, and a number of miscellaneous positions. But by both the Constitution and the statutes the appointment of the vast majority of the civil officers is vested in the heads of the departments. Since, with the exception of the period when the Tenure of Office Act was in force, the president has always had the unrestricted power of removal, and since this power of removal gives sanction to his directions to heads of departments, it is possible for the president alone to compel a change in personnel of nearly three hundred thousand offices.

Terms of officers

Originally the appointments were made for indefinite terms, — good behavior with the absolute right of removal at any time, — but in 1820 a four-year term was established for certain officers, the number of which has been extended by subsequent statutes. At present, moreover, such a term is recognized by custom sanctioned by voluntary resignations or by removal for practically all officers. Thus at some time during the four-year term of the president he has the opportunity to fill almost all the offices.

Partisan appointments made from beginning of government

At the organization of the government President Washington, on whom devolved the organization of the government and the appointment of all the officers, seemed to follow three principles: Fitness for office and efficiency he absolutely insisted upon. He also recognized geographical conditions and attempted to distribute the higher offices with regard to the importance of the sections of the country. Finally, in the appointment of local officers, he consulted the feelings of the locality in order to make the choice acceptable to the people. There is little evidence that his first appointments were made for political reasons and none that they were for party reasons, for at that time parties were scarcely existent. In his second administration, however, when parties were solidified and partisan attacks had embittered him, he wrote to Pickering:

> I shall not, whilst I have the honor of administering the government, bring men into any office of consequence knowingly whose political tenets are adverse to the measures the general government is pursuing; for this, in my opinion, would be a sort of political suicide.[1]

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[1] C. R. Fish, The Civil Service and the Patronage, pp. 13, 14. Much of the material for this chapter has been drawn from Professor Fish's book.

Consequently the civil service was filled with Federalists, a condition which was continued under Adams.

First removal for partisan reasons made by Jefferson

The election of Jefferson in 1800 presented a new problem. The party behind Jefferson was in opposition both in principle and theory to the Federalists; few or none of its members held office, and not only was the demand strong for a purifying of the service of the Federalist influences, but political expedience demanded recognition and reward for political services. The pressure put upon Jefferson was tremendous, and he yielded. Altogether he changed one hundred and nine civil officers out of a total of four hundred and thirty-three, or about 22 per cent. Starting with high ideals of improving the efficiency of the service by his removals and new appointments, his often quoted lament, "Few die and none resign," indicates his difficulties. Although his partisan removals seem small when compared with the numbers made at later periods, yet on him must rest the burden of having established the system.

Growth of removals for partisan reasons under Jackson

In the three administrations which came between that of Jefferson and Jackson only sixty-six changes in offices were made; hence, when Jackson came to the presidency in 1830, a condition confronted him analogous to that which Jefferson had faced. Jackson met it with more brutal frankness. Conscientiously believing in the theory of rotation in office and denying that the incumbent had any vested rights to his position or was worthy of consideration, he set out to remove those who were inefficient or who had opposed him politically, and to reward his friends and supporters. In so doing, all kinds of rumor, gossip, and tittle-tattle were considered sufficient evidence to bring about a removal. During his two administrations two hundred and fifty-two civil officers were changed out of a possible six hundred and ten, or over 40 per cent. For Van Buren there was not the same pressure or necessity, and he made only about eighty changes; but this small number was never again equaled and only once approached. In fact, until the administration of Grant, with the exception of Van Buren and Fillmore, the number of changes never fell below three hundred, and under Lincoln and Johnson reached fourteen hundred and fifty-seven and nine hundred and three respectively.

The "spoils system"

The system thus fastened on the country is known as the "spoils system," a name derived from a speech of Senator Marcy in which he said: "The politicians are not so fastidious as some gentlemen are as to disclosing the principles upon which they act. They see nothing wrong in the rule that to the victors belong the spoil of the enemy." As the table of changes shows, the spoils system was invoked not merely when there was a change of party but whenever a new president was inaugurated, although a party revolution meant a more wholesale change of officers. The underlying principles of the spoils system were two, the idea of rotation in office and the use of office as ammunition in party warfare. Both were found in colonial times; but the idea of rotation in office gained popularity with the increase of democracy. The belief that changes in office were of educative value, the feeling that the duties of a public servant were such that anyone could successfully master them, and the distrust and jealousy of an officeholding class made the principle of rotation popular.[1]

Underlying ideas of spoils system

The spoils system first introduced in states

The practical necessities of the politicians and the success which quite generally followed a skillful use of patronage convinced the party leaders of the advantage of the system. It was successfully used in state politics before it was in national, and the wonder is that it was not earlier adopted.

Effect of spoils system

Although the effect of the spoils system may have hastened the popular control of the government, the quadrennial cyclones disorganized the civil service. The character of the officeholders was not always bad. Public office was looked on as a gamble which might lead to nothing or to great rewards; hence many men of first-rate ability sought and obtained office — men to whom the certain tenure and fixed rewards of the present day would not appeal. But the effect of these frequent changes upon the service was bad. Notorious instances of dishonesty were discovered, particularly in the customs service; and ignorance of official duties was common, while inefficiency and extravagance resulted. In addition, the pressure which was brought to bear upon the president and the heads of the departments was intolerable, and for one satisfied appointee there were many disappointed ones whose enmity had to be reckoned with.

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[1] See C. R. Fish, The Civil Service and the Patronage, chap. iv

"The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally gained by their experience. . . .

"In a country where officers are created solely for the benefit of the people, no one man has more intrinsic right to official station than another. . . . No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is a matter of right." — Extract from the first message of Jackson, Richardson's "Messages of the Presidents," Vol. II, p. 449

Attempts at reform

Attempts to reform these conditions began before the Civil War, and in 1853 an act was passed providing for the classification of the clerks in Washington upon the basis of compensation — no clerk to be appointed except upon an examination conducted by the head of the department. Inasmuch as these examinations were not competitive but "pass" examinations, they offered little check to the spoils system. In 1864 Charles Sumner introduced a bill in the Senate which provided for a board of examiners, appointment as the result of competitive examination, promotion by seniority, and removal for good cause only; but no action was taken upon it. The first reform measure actually to become a law was passed as a rider to the appropriation bills of 1871. By this, the president was authorized to prescribe regulations for admission to the service and to ascertain the fitness of each candidate. The responsibility for the organization of the commission rested entirely upon the president. President Grant, who had been urging that some reform be made, appointed a commission with George William Curtis as chairman, which proceeded to formulate rules for competitive examinations for admission to the service. In 1872 these rules were applied to the departments in Washington and the federal offices in New York. But Grant found it impossible to live up to the standard which he had set or to resist the pressure brought to bear upon him. He made such an offensive appointment in New York that Curtis resigned, and in 1875 Congress refused to make further appropriation for the continuance of the work. The plan was revived for the post-office and customs service in New York in 1877, but the first comprehensive and detailed civil service reform act was not passed until 1883.

Present system

The act of 1883 and the subsequent amending statutes, together with the rules promulgated from time to time by presidents, established the following system: (1) A commission of three, not more than two of whom shall belong to the same party, is appointed by the president. This commission is to aid the president in making regulations for the service and to conduct competitive examinations and to recommend candidates. (2) Clerks and officers in certain departments are classified according to salary, and to this group, known as the "classified service," appointment can be gained only by competitive examination. (3) Examinations are open, of a practical nature, and a period of probation is to precede the final appointment. (4) Appointments to the offices in Washington shall be apportioned among the states according to population. This provision is extremely difficult to enforce, restricts competition, works an injury to the service, and opens the doors for fraud. (5) Political assessment by federal officers or upon premises occupied by federal offices is forbidden, and no person can be removed for refusing to contribute to a political fund. (6) No senator or representative is allowed to make any recommendation for the classified service. (7) Veterans who have suffered from wounds or sickness in the line of duty are given a preference in the appointments. (8) The law is not to apply to any person nominated by the president and confirmed by the Senate; that is, to presidential offices.

xtension f system

The act directed the Secretary of the Treasury and the Postmaster-General to make classification and provided that the other departments should do so at the direction of the president, and in its immediate application covered about fourteen thousand positions. Successive legislation and presidential orders have extended the scope of the act, until by 1916 the classified service, for which competitive examinations are necessary, included over two hundred and ninety-six thousand positions out of approximately four hundred and eighty thousand.[1] As the presidential offices number over ten thousand, and as over twenty-five thousand offices are specially exempt because of their confidential or peculiar nature, there are less than one hundred thousand, or less than a quarter of the total of more than four hundred thousand offices, which are entirely at the mercy of the spoilsman. Until 1913 every president made some additions to the classified service, but whenever there was a change of party there was great criticism of the act and a constantly growing demand to make exemptions.

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[1] Since 1916 the expansion of the civil service because of the war has produced an abnormal condition, which renders statistics for comparative purposes of little value.

Effect of changes in party on the classified service

The first party revolution after the passage of the act came in 1884 and brought Cleveland to office, pledged to the principles of civil service reform. Nevertheless, in sixteen months he removed 90 per cent of the presidential officers, 68 per cent of the unclassified service in the Interior Department, and practically all the fourth-class postmasters. Of the classified service, however, less than 10 per cent were changed, and before the end of his term he had extended the classified service to include the railway postal service. In 1888 President Harrison and the Republicans came to power, and one of the political weaknesses of the act was apparent. Whenever the system was extended to a new class of offices, the incumbents were brought within the protection of the rules without having to pass examinations. Hence it was easy for a retiring president, particularly when it was apparent that his successor was to be of another party, to protect his appointees and embarrass his successor. Such was the case in 1888, and Harrison up to 1890 made over thirty-five thousand removals, about fifteen thousand more than were made by President Cleveland. The second administration of Cleveland saw some partisan removals, but a simplification and improvement and extension of the system as used. In all, about thirty thousand offices were added to the classified service, so that it then included about eighty-five thousand out of two hundred and five thousand. With the return of the Republicans in 1896 there came a backward step. The unclassified service, still large, served as a sop to the office seekers; the war with Spain, with the resulting extension in the service, furnished places for more; but thirty-six hundred and ninety-five places were removed from the classified service, over six thousand transferred from the charge of the commission to that of the Secretary of War, and one thousand temporary appointments made permanent. The administrations of Roosevelt and Taft, both Republicans and following Republican presidents, saw few partisan changes and many extensions. The most noteworthy under Roosevelt were the rural free delivery service, the census office, the forestry service, and the fourth-class postmasters north of the Ohio, — in all about one hundred thousand. President Taft continued the policy of extensions, notably by his order of October 15, 1912, which brought the remainder of the fourth-class postmasters under the rules, and both he and Roosevelt attempted to introduce the merit tradition in the diplomatic and consular service.

The policy of President Wilson

The result was that when the Democrats came to power in 1913, after being sixteen years out of office, there was unusual pressure for office and only about one hundred thousand places in the unclassified service to satisfy the demand. President Wilson, who had been a strong advocate of civil service reform and a vice president of the National Civil Service Reform League, was forced to make some concessions. The fourth-class postmasterships, which had been covered into the service less than a month before his election, were practically all held by Republicans in the South, the stronghold of the Democrats, and had been considered the legitimate rewards for party service. On May 7, 1913, the president amended the previous orders by providing that no fourth-class postmaster should be given a classified status unless he was appointed as the result of competitive examination. The present incumbents might, if they chose, take the examinations, but according to the rules the appointment might be made from the three candidates receiving the highest marks. A Senate amendment was added to the Underwood Tariff Bill, allowing the appointment of all officials connected with the collection of the new income tax under such rules as "may insure faithful and competent service." This and the provision in the new banking act which directs that the employees of the Federal Reserve Board are to be appointed without regard to the provisions of the Civil Service Act were failures to extend the system where it was most needed. The Urgency Deficiency Bill of 1912 contained a notorious backward step. By one of its provisions it removed from the classified service every subordinate of the collectors of United States revenue and in the offices of the United States marshals. These concessions to the spoilsmen have brought bitter criticism upon President Wilson. Yet it may be doubted whether the changes, even the exemptions, involved a greater per cent of partisan appointments than were made by Harrison or McKinley, while the necessity of solidifying the party was certainly greater than that which confronted his predecessors.[1]

Civil-service examinations less general than those in England

The great act of 1883 provides that the examinations shall be "practical in their character, — and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service in which they seek to be appointed." This provision is in striking contrast with the principles adopted in England. There the examinations are of a general character, designed to test the candidate's ability, capacity, and general education. The attempt is made to obtain well or highly educated men who may be trained in the duties of governmental service. In the United States the opposite principle is adopted. The endeavor is to get candidates already trained in the special duties required of their position, and it is assumed that such are to be found in private enterprises. The result is startling. In England the highest positions are filled by examinations as difficult as the honor examinations in the best universities, while the lower positions require considerably more training than is obtained in the average American high school. As a result, the English service attracts to it a highly educated class, untrained it is true in the technical duties of their positions, but fitted to develop into very useful and able officials. In the United States the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high-school education, together with some practical proficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises. Attempts on the part of the examiners to raise the educational standard are subject to attack; the argument being that practical and technical skill rather than education is required.

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[1] By executive order of March 31, 1917, President Wilson extended the competitive system to all first-, second-, and third-class postmasters. Appointments are now made to these offices as a result of competitive examinations.

Standard

The standard of passing these examinations is not high — 70 on the scale of 100. From the lists of those who have passed, the commission, on application of any appointing officer, sends the names of the three obtaining the highest per cent. From these names the appointment must be made or else reasons be given. The competition thus is not absolute and is furthermore limited by two provisions. First, preference for disabled veterans is given to the extent of placing the names of those receiving the rating of 65 per cent or more above all others. Second, the attempt to apportion the offices in Washington according to the population of the states frequently necessitates the listing of candidates of low rating above those of higher standing. The person selected for appointment is placed upon probation for six months; and if satisfactory at the end of that time he receives a permanent appointment.

Promotions

Promotions are made in the service as the result of further competitive examination, taken in connection with the efficiency records kept by the department, and the opinion of the candidate's superior officer. Criticism has been leveled at these efficiency records, the charge being that they open the way for official tyranny and favoritism and encourage servility on the part of the subordinates. Such danger of course exists, yet if efficiency in daily work is to be recognized and rewarded, the power to estimate it must be lodged in the hands of those in immediate contact with the employee. These records, it would seem, must be taken into account, or else promotion must be placed either upon seniority or upon the basis of fresh competition without consideration of past service.

Removals

The power of removal is restricted in only one particular. Refusal to perform political service or to contribute to a political party cannot be made a cause for removal. The presidential regulations, however, have gone further in the attempt to make the service nonpartisan and have forbidden political activity upon the part of the employees. While they retain the right to vote, they are forbidden to take active part in the management of any party or in furthering any election. Disobedience of these rules is cause for removal. Thus partisan activity is prohibited.

Aside from the statutory limitation upon removal for refusal to perform political service, the president, either personally or through regulations and directions to the departments, can regulate the removals in all branches of the service, classified or unclassified. Appointment to a position in the classified service is thus not equivalent to a life appointment, and the courts have held that such appointment does not give "any such tenure of office as to confer upon them a property right in the office or place."[1] Again and again the courts have held that the right of removal is an incident of the right of appointment and that they will not review or inquire into the causes of such removal. The civil service regulations are thus voluntary limitations made by the president upon his power and directions as to the method in which his subordinates shall exercise this power. Rule XII, Sect. ii, provides that no person shall be removed from a competitive position except for such cause as will promote the efficiency of the service. The president or heads of the departments, when satisfied that an employee is inefficient or incapable, may remove that employee without notice, but the ground for removal must be stated. When recommendations for removal are made by subordinate officials to the heads of the departments, the department chief may, at his discretion, inform the person to be removed of the causes and allow him to answer the charges. Of course in addition to inefficiency, insubordination and violation of the rules and regulations of either the civil service or the particular department constitute good reasons for removal.

Causes for removal must be stated

The criticism is frequently made not that there are too many removals but that there are too few inefficient employees discharged; not that the service is changed too rapidly but that it has become clogged with superannuated employees. There is considerable truth in this criticism, although none in the charge that these employees are protected by the civil service rules. The matter is in the discretion of the president and the heads of the departments. These executives are confronted by a serious dilemma. Either they must connive at inefficiency with its

Danger not from too many but too few removals

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[1] *Morgan* v. *Munn*, 84 Fed. Rep. 551, 553.

Pensions for employees in the civil service urged but never adopted

attendant extravagance or else they must discharge employees whose salaries have been so low that they have been able to make no provision for old age. The matter of civil pensions, either in the form of compulsory deductions from salaries or governmental grants, has been frequently discussed. In 1912 President Taft's commission upon economy and efficiency recommended that each employee in the classified service at Washington upon reaching the age of seventy should be retired upon half pay, provided that no allowance should be less than six hundred dollars. The report further contemplated that each person hereafter entering the service should pay the entire expense of his own retirement by annual contributions from his salary so that upon reaching the age of seventy the fund he had accumulated would provide for the retiring allowance. This recommendation was not adopted. Although private corporations are finding that it is more economical to pension superannuated employees, the idea of pension for the civil servants of the government has never appealed to Congress. Although similar systems have been adopted in other countries to the great improvement of the service, no other country has been led into such an extravagant military pension system as is now in vogue in the United States. Fear of similar experience may well cause Congress to hesitate before entering upon a scheme of civil pensions.

ADMINISTRATIVE REGULATIONS

The discipline of this multitude of officials as well as the direction of the discretionary power they possess is accomplished by administrative ordinances and regulations.

In Europe officials have wide ordinance power

In European countries these are much more numerous and far-reaching than in the United States. In France, for example, the custom of passing statutes in general terms places upon the president, the ministers and prefects, and even the mayors, the duty of issuing ordinances to carry into effect the principle of the law. A similar practice prevails in Germany. In England legislation goes into more detail, but even there the statutory and provisional orders give the executive more ordinance power than it is the practice to give in the United States. In the

In the United States legislation is detailed

United States legislation goes into such detail, and congressional control through appropriations is carried to such a degree that the extent of executive regulation by means of administrative orders is underestimated. As Professor Fairlie says:

Extent of administrative regulations in the United States

> There are in fact many elaborate systems of executive regulations governing the transaction of business in all the various branches of the administration. These include organized codes of regulation for the army and navy, postal service, the patent office, pension office, the land office, the Indian service, the customs, internal revenue, and revenue cutter service, the consular service, and the rules governing examinations and appointments to the whole subordinate civil service, and in addition to these systematized rules there is an enormous mass of individual regulations, knowledge of which is limited to the few persons who have to apply them and to those whom they affect.[1]

Administrative regulations not a delegation of legislative power

These regulations, made by the president or by the heads of the departments, seem at first sight to involve a contradiction of the principle of our Constitution that a power delegated to a particular branch of the government cannot by it be delegated to another department. While this principle is true, and no real legislative power may be delegated by Congress to the executive department, yet "discretionary authority may be granted to executive and administrative authorities: (1) to determine when and how powers conferred are to be exercised; and (2) to establish administrative rules and regulations binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed."[2] The difference between the proper and the improper delegation of such authority was clearly stated in the opinion of the case of *Field* v. *Clark*, where the court said:

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised

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[1] F. J. Goodnow, The Principles of the Administrative Law of the United States, p. 87, quoting J. A. Fairlie, "The Administrative Power of the President," in *Michigan Law Review*, Vol. II, pp. 190–205.

[2] W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1318.

under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[1]'

Such regulations necessary

The court furthermore held that such a delegation was not only allowable but absolutely necessary. For example, in 1907 it said:

> Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and to bring about confusion, if not paralysis, in the conduct of public business.[2]

Regulations which affect the officers or employees of the government

Such ordinances or regulations may be considered under two classes: (1) those which affect the members of the service,—military, naval, or civil,—and (2) those which affect the public. In both cases the power to issue them is derived from some constitutional provision or from some statute. In the first class the regulations for the army and navy made by the executive may be derived from his constitutional position as commander in chief. It is true that Congress is also given power to make rules for the government of the land and naval forces, but the courts have repeatedly held that the regulations of the president as commander in chief were legal:

Power of the president to make regulations for the army

> The power of the executive to establish rules for the government of the army is undoubted. . . . The power to establish implies, necessarily, the power to modify or repeal, or to create anew. . . . Such regulations cannot be questioned or defied because they may be thought unwise or mistaken.[3]

Power to make regulations derived from the general executive power and special acts

In the civil service such regulations may be derived from the constitutional provision directing the president to enforce the laws of the United States, but more frequently the power comes from some particular act. In any case the regulations made by the president or the heads of the departments must not be contrary to the Constitution, general law, or particular statutes. The power to enforce these regulations is derived from the power to dismiss any officer whom the executive has appointed. But these ordinances may also involve penal punishment, as, for example, the code for the revenue cutter service, which is based entirely upon executive order, establishes penalties that the courts will enforce.[1]

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[1] 143 U. S. 649, 693, 694, quoting with approval *Cincinnati, Wilmington, etc., R. R. Co.* v. *Commission*, 1 Ohio Stat. 88.

[2] *Union Bridge Co.* v. *United States*, 204 U. S. 364, 387.

[3] *United States* v. *Eliason*, 16 Peters, 301, 302, quoted by J. A. Fairlie, in "The National Administration of the United States," p. 26, where references to other cases are given

Such regulations may affect the general public to the extent of depriving a person of liberty or property

These regulations, however, may affect not merely the members of the service but the general public. They may not only prescribe what the citizen shall do in order to enjoy the service of the department (for example, the postal regulations) but also may operate to the extent of depriving him of either his property or his liberty at the discretion of some administrative officer. What then becomes of the principle that no citizen can be deprived of his life, liberty, or property without due process of law, if an administrative tribunal or official can, without a trial, imprison or fine a person? The leading case upon this subject was decided in 1856 in which the court held that due process of law, or the law of the land, neither by reason nor precedent necessarily involved judicial proceedings.[2]

Property may be sold for taxes without judicial proceedings

In 1882 the court cited the above case and held that a warrant for the collection of taxes issued against a private individual authorizing the sale of property was due process of law, saying in the course of the opinion:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the

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[1] J. A. Fairlie, The National Administration of the United States, p. 22; F. J. Goodnow, The Principles of the Administrative Law of the United States, pp. 84 ff.

[2] "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper" (*Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272). See also an excellent article by Professor Thomas Reed Powell on "The Conclusiveness of Administrative Determinations in the Federal Government," in *American Political Science Review*, Vol. I, pp. 582 ff.

laws here in question involved any wrong or unnecessary harshness, it was for Congress or the people who make congresses to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.[1]

Examples of administrative decisions where no judicial decision is necessary:

(1) Land patents

(2) Customs valuation

(3) Fraud orders

Summarizing some of the more important decisions, it has been held that a land patent issued in accordance with law, "in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land";[2] also that the valuation made by a customs officer is not open to question in an action of law, as long as the officers acted without fraud and within the power conferred on them by statute.[3] The issuance of "fraud orders" by the Post Office Department was upheld by the court in the following words:

> It is too late to argue that due process of law is denied whenever the disposition of property is effected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. . . . If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government.[4]

(4) Railroad rates

Finally, by the amendment in 1906 to the Interstate Commerce Act, the Commission was intrusted with the power to make rates for railroads engaged in interstate commerce provided the same were "just and reasonable," while by the Act of 1914 the

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[1] *Springer* v. *United States*, 102 U. S. 566, 594.

[2] *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646.

[3] *Hilton* v. *Merritt*, 110 U. S. 97.

[4] *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508, 509. For an extended discussion of this subject see W. W. Willoughby, The Constitutional Law of the United States, Vol. II, chap. lxiv.

Federal Trade Commission may issue orders to prevent unfair competition, and its findings, should the case be carried to court, are to be regarded as conclusive evidence.

(5) Trade regulations

Persons may be restrained of their liberty by the ruling of an administrative official, whose decisions, if made as the result of a hearing, the courts will not review. The most notable examples of this power and the leading cases arise from the enforcement of Chinese Exclusion Laws and the immigration laws. By these laws officials of the Department of Labor are given the power to determine whether the immigrant comes within the classes whose entry is prohibited. If so, he may be detained and deported. From the decision of the subordinate officer appeals lie to the Commissioner-General, thence to the Secretary of Labor. In 1905 this power was most broadly sustained by the decision in the case of *United States* v. *Ju Toy*,[1] where it was held that a writ of habeas corpus should not be granted to a person of Chinese descent detained for return to China after he had been denied admission by the immigration officers, whose decision had been affirmed on appeal to the Secretary of Commerce and Labor. In the course of the opinion the court said:

Restraint of liberty by order of an official

Chinese Exclusion Laws

In the Ju Toy case it was held that a person might be deported without a judicial trial

> If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial.

This decision was vigorously combated by Justice Brewer and has been widely criticized. One reason for the criticism was the fact that the lower court had determined that the petitioner was a citizen and had granted him a judicial hearing. As Justice Brewer said:

Dissenting opinion

> It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime — for it is no crime for a citizen to come back to his native land — must by the action of a ministerial officer, be punished by deportation and banishment, without trial by jury and without judicial examination.
>
> Such a decision is, to my mind, appalling.[2]

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[1] 198 U. S. 253, 263.

[2] Ibid. 269.

Point at issue really was whether an official or the court should decide question

However, as Professor Powell points out, all that the case clearly decided was that it may be finally determined by officers of administration whether a Chinese person seeking admission was born here or not. Such a decision was absolutely necessary if there was to be any limitation upon immigration and if the courts were to be kept free for their own proper functions.

> Due process of law can rightly demand no more than that the procedure devised for reaching this decision give to the individual every opportunity to establish his rights, consistent with maintaining the orderly and efficient administration of the government.[1]

Appeal allowed from subordinate official to head of department

It must not be thought, however, that the decisions of subordinate administrative officials or even heads of departments are necessarily final and never subject to review by the courts. In the first place, the court has said: ". . . The official duty of direction and supervision . . . implies a correlative right of appeal . . . in every case of complaint, although no such appeal is expressly given."[2] Furthermore such appeals are generally expressly provided for by statute. It must be noted, moreover, that the courts will not interfere and grant relief until this right has been utilized and the decision of the subordinate has been sustained by the superior officer.

Decision of head of department reviewable by court on questions of

(1) jurisdiction

(2) hearing

(3) impartiality

The final decision of the head of a department or of the president is also reviewable by the court under certain conditions. In the first place, the jurisdiction of the administrative agent is always open to examination. It must be clearly shown that the officer or department deciding the case has received such power by statute, and that the case is one which properly falls within the terms of the statute. In the second place, the courts will determine whether the administrative agents have followed the essential principles of "due process of law." As has been shown, these need not involve a judicial examination and may be satisfied by an informal hearing. In the third place, although wide discretionary power may be granted to officials, their decision must rest upon "reason, justice, and impartiality, and must be exercised in the execution of policies predetermined by legislative act or fixed by common law."[1] In the fourth place, the courts will grant relief from any decision of an administrative officer contrary to the Constitution, common law, or particular statute.

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[1] *American Political Science Review*, Vol. I, pp. 582, 597.

[2] *Butterworth* v. *United States*, 112 U. S. 50, 57 In this particular case it held that appeal from the decision of the Commissioner of Patents, in certain cases, lay not to the Secretary of the Interior but to the Supreme Court of the District of Columbia.

(4) constitutionality of law under which official acts

Certain cases will make some of the points clear. It was held in 1902 that a fraud order could not be issued simply upon the Postmaster-General's personal judgment as to the fraudulent character of the business, but that his judgment must be one founded on fact ascertained by evidence.[2] In 1913 two reversals of decision of the Secretary of Commerce brought about considerable discussion and well illustrate the control which may be exercised by the courts. The first was in regard to General Castro, the former president of Venezuela, who was denied admission by the immigration officials on the ground that he had murdered General Paredes. The statute upon which the official relied excluded persons who had been convicted or admitted having committed felony or other misdemeanors involving moral turpitude. The courts overruled the decision of the secretary on the ground that as General Castro had never been convicted, "the only proof competent for the immigration authorities to receive, on which to base an order of exclusion, is the alien's own admission, nor can this be presumed by his refusal to answer questions put to him by the immigration authorities with reference to such alleged crime."[3]

Decision of official must be founded on facts ascertained by evidence not upon mere opinion

Official must interpret the law correctly

Castro case

Mylius case

In the other case, Mylius, who had been convicted of criminal libel of the king of England, was denied admission, but released on the following grounds: (1) that the immigration authorities acting in an administrative not judicial capacity must follow definite standards and apply general rules; (2) criminal libel, being a misdemeanor at common law, was not an offense involving moral turpitude for which the offender should be excluded.[4]

From these two cases it will be seen with what care and how strictly the courts limit the conclusiveness of the decisions of administrative officials. But when such officials act within limits laid down by common law, the Constitution, and statutes, their decisions are final and not subject to reversal by judicial process.

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[1] W W. Willoughby, The Constitutional Law of the United States, Vol II, p 1293.

[2] *Amer. School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94

[3] *United States ex rel Castro* v. *Williams*, 203 Fed. Rep. 155

[4] *United States ex rel Mylius* v. *Uhl*, 203 Fed Rep. 152.

Liability of officials for

It is a general principle of both English and American law that officials possess no immunities resulting from their official positions. Like other individuals they may be held responsible for their acts. They may be sued in the courts and compelled to pay damages for injuries they may have committed. In theory at least the same rules of law are applied to them as are applied to other citizens. Nevertheless, the growth of governmental activities has produced certain exceptions. The reasons for these exceptions can perhaps best be seen from the following classification of acts of officials.

(1) acts not justified by the law:

(a) personal acts unconnected with official duties

(b) official acts beyond the law

Acts not justified by law include (1) purely private or personal acts unconnected with official duties. For acts of this sort an official is held responsible just as is any other citizen. He may be punished for a crime or compelled to pay damages for a tort. For example, if a government clerk commits theft, assault, or trespass, the fact that he holds an official position in no way exempts him from the consequences of his act. (2) A second class of acts not justified by law are acts performed in the line of official duty but contrary to or beyond the powers granted by the statute. For these acts the officer is also liable. The person aggrieved may sue him in the court and may be awarded damages. The relief given to the injured party, however, is limited by the resources of the official. Damages for unlawful acts are to be obtained not from the state but from the person performing the act.

[Remedies in the hands of the courts]

The remedy is in the hands of the courts. The courts interpret the law and determine the jurisdiction of the officers. Thus every act of every official, in theory at least, may be reviewable by the courts. But, as has been shown, the question to be decided by the court is simply one of jurisdiction. If the court holds that the act was within the powers granted by the law, the official is relieved from all personal liability for damages.

(2) official acts within the law

Official acts performed within the terms of the statute are of two sorts: (1) acts involving discretion or judgment and (2) purely ministerial acts involving no discretion or judgment upon the part of the official. The courts will take no cognizance

(a) Discretionary acts not reviewable by courts

of the first class. Officials have been appointed or selected to use their judgment, and the courts cannot substitute their opinion for the discretion of the official. Neither will the courts award damages either against the official or the state for unwise or mistaken use of official discretion. The only appeal is to the political department of the government. Congress may appropriate money by way of relief directly or may refer the determination of the question to the Court of Claims. In either case the pecuniary relief comes not from the legal decree of a court but from the political action of Congress.

(b) Ministerial acts reviewable

Ministerial acts involving no discretion are reviewable by the courts. For a wrongful act of this sort the court will award damages. But it must be clearly shown that the party aggrieved has, as an individual not merely as a part of the general public, a right to have the act performed. Thus, a United States marshal is not responsible for the damages suffered by an individual resulting from the failure of the marshal to keep the peace. On the other hand, where the individual has a private interest in the performance of the act the court will grant damages for its nonperformance and compel the official to perform it.

Exceptions:

(1) The president

(2) Heads of departments

Exceptions of certain officers are made for the convenience of administering the government. The president, like the king of England, is never held personally liable nor subject to judicial summons, although he may be impeached and removed from office. In like manner it was held in *Kendall* v. *Stokes*[1] that the head of a department was not liable for damages resulting from an error in judgment on his part. These exceptions, however, lose much of their apparent force when it is remembered that neither the president nor the heads of departments perform many acts unassisted by subordinates. Almost every official act is the actual act of a subordinate, and for that act the subordinate may be held responsible in accordance with the principles just discussed. Hence it is apparent that judicial control and legal liability are never very far removed.[2]

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[1] 3 How. 87.

[2] For further treatment see F. J. Goodnow, Principles of Administrative Law in the United States, pp. 383–409; W. W. Willoughby, The Constitutional Law of the United States, Vol. II, pp. 1309–1316.

CHAPTER X

THE ORGANIZATION AND FUNCTIONS OF THE EXECUTIVE DEPARTMENTS[1]

Organization and functions of executive departments constantly changing

To give in full an account of the work of the executive departments of the government would entail writing an exhaustive and encyclopedic description of the manifold operations of the government. To be complete and accurate this would involve detailed quotations from numerous statutes, not merely those which prescribe the functions of each department but the appropriation bills which are constantly prescribing changes and new duties. Even this description would soon be inadequate, for the government is not static, and changes in organization are constantly being made and new functions constantly being added. Only the volumes of the Statutes at Large and the annual compendious official summaries can give an adequate picture of the actual conditions and operations. Nevertheless, it is advisable to give some idea of the outlines of departmental organization and the chief duties of the various main departments, together with a brief account of some of the more important detached and miscellaneous bureaus. Even in this outline it should be remembered that, since the passage of the Overman Act, the president has been allowed to transfer and change the duties of the various departments and bureaus as the necessities of the late war might demand. The ending of the war brought about changes in departmental organization which will probably be followed by still further readjustments. The conditions and duties here described, however, are those which normally exist in time of peace, although some of the more important changes made necessary by the war are indicated.

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[1] See J. A. Fairlie, The National Administration of the United States; The Congressional Directory; H. C. Gaus, The American Government, Organization and Officials, with the Powers and Duties of Federal Office Holders (an extensive compilation).

Effect of such a centralized system

centralization of power. Through the interstate clause of the Constitution federal control and federal supervision has been greatly extended into many fields which were formerly considered purely the concern of the states. State supervision has consequently decreased, through the growth of federal activity. The centralized organization of the federal civil service facilitates the administration of these activities. At the same time it offers a dangerous but inviting field for political influence, to be exercised through them, not merely in favor of particular candidates but also to popularize and accelerate the adoption of particular measures desired by the administration.

THE DEPARTMENT OF STATE [1]

Composite duties of the Department of State

The Department of State was first organized as the Department of Foreign Affairs; but was later given some of the duties which are ordinarily performed in other countries by the Home Secretary or Secretary of the Interior. Its functions as the medium for the conduct of foreign affairs and the organization of the diplomatic and consular services are treated in the chapter on "Foreign Affairs."[2] Nevertheless, certain features of the organization should be explained. The Counselor for the Department, formerly a legal adviser, now outranks the Assistant Secretaries, and becomes Acting Secretary in the absence of the Secretary. His duties are now no longer chiefly legal, since he is charged with the supervision of such matters and correspondence as the Secretary may assign him.[3] The Division of Foreign Intelligence is charged with the publicity work of the department. It prepares news items for the press, and issues information to diplomatic and consular officers, and information for publication abroad.

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[1] The Department of State is organized as follows: the Secretary of State, the Undersecretary of State, the Assistant Secretary of State, the Second Assistant Secretary, the Third Assistant Secretary, the Chief Clerk, the Solicitor and five assistant solicitors, Adviser for Foreign Trade, Adviser on Commercial Treaties; seven bureaus — Accounts, Appointments, Citizenship, Consular, Diplomatic, Indexes and Archives, Rolls and Library; five divisions — Far Eastern Affairs, Latin-American Affairs, Near Eastern Affairs, Mexican Affairs, Western European Affairs.

[2] Chapter XXI.

[3] The Counselor for the Department was abolished by the Sixty-fifth Congress and the office of Undersecretary of State created.

It also prepares and publishes the Information Series and the Foreign Relations of the United States.

Bureaus of the Department of State

The Bureau of Appointments has custody of the Great Seal, the preparation of commission, etc. The Bureau of Citizenship examines the applications for and issues passports, the Bureau of Rolls and Library has custody of the rolls and treaties, and promulgates the laws, treaties, executive orders, and proclamations, and so forth. The Bureau of Indexes and Archives receives and indexes all the letters and communications of the department.

THE DEPARTMENT OF THE TREASURY[1]

Difference in the phraseology of the act organizing the Department of the Treasury

The organization of the Treasury shows a departure from that of most of the other departments. The organic statute omits the word "executive" and all references to the dependence of the secretary upon the president, and requires the Secretary of the Treasury to report directly to Congress. Nevertheless, the president through his power of appointment and removal can enforce his will upon the Secretary of the Treasury as well as upon the secretaries of the other departments.

Many of the normal functions of the Treasury Department in connection with the collection of the taxes, the payment of money, the coining of money, and the banking system are discussed in the chapter on "Finance."[2] But the Treasury Department from the first has had jurisdiction over numerous matters not closely connected with finance; and some of these, together with certain financial functions of the department, should be explained.

The Comptroller of the Treasury

The Comptroller of the Treasury prescribes rules for the keeping and rendering of the public accounts, is charged with the

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[1] The Department of the Treasury is organized as follows: the Secretary of the Treasury, five assistant secretaries of the Treasury, the Chief Clerk, the Comptroller of the Currency, the Treasurer of the United States, the Commissioner of Internal Revenue, Director of the Mint, Comptroller of the Treasury; six auditors for the various departments; Register of the Treasury, eight divisions — Appointments, Bookkeeping and Warrants, Customs, Loans and Currency, Mail and Files, Printing and Stationery, Public Moneys, Secret Service; the Federal Farm Loan Board; Bureau of Engraving and Printing; Bureau of Public Health Service; the Coast Guard; Supervising Architect's Office; Bureau of War-Risk Insurance; General Supply Committee.

[2] Chapter XVIII.

duty of revising the accou
to approve, disapprove, or mo
making original constructions of
of appeal as far as an administrative
of accounts.

The Federal Farm Loan Board is charg
tration of the Federal Farm Loan Act. It es
land banks, appoints temporary directors, and
operations. It makes appraisal of farm lands and
publishes amortization tables. It supervises the op
national farm loan associations and joint-stock land bank

The Federal Farm Loan Act was planned to enable the far
to borrow money at more reasonable rates than they had bee
doing. When it is remembered that in 1910 over a third of the farms operated by owners were mortgaged, that a large part of the loans were for short periods, and that the interest and commissions ranged from 5.3 per cent to 10.5 per cent, the need for some aid or regulation becomes apparent. The federal land banks loan money not directly to the farmers but to farm loan associations which are expected ultimately to own the stock of the land bank, for these associations are required to subscribe to the capital stock of the land bank to the amount of 5 per cent of each loan taken. The bank may lend, through the association's money, upon first mortgages from $100 to $10,000, provided that no loan be for more than 50 per cent of the value of the land and 20 per cent of the permanent improvements upon it.

Bureau of Public Health Service

The Bureau of Public Health Service conducts scientific investigations, disseminates information, enforces national quarantine laws, and cares for sick and disabled seamen at twenty-two marine hospitals.

Coast Guard

The Coast Guard renders assistance to vessels in distress, destroys or removes wrecks, derelicts, and other floating dangers to navigation, extends medical aid to American vessels engaged in deep-sea fishing, protects the customs revenue, enforces the law and regulations governing anchorage of vessels, quarantine, and neutrality, and aids in suppressing any mutinies.

Supervising Architect

The Supervising Architect prepares the plans for constructing, rebuilding, repairing, and enlarging all federal buildings.

m states of the jurisdiction
same.
ttee is composed of one officer
is charged with making an annual
needed by all the departments, the
n supplies, and the soliciting of bids for

THE DEPARTMENT OF WAR[1]

itary
rs
) construction of public works
(3) river and harbor improvement
(4) insular possessions

rtment of War is peculiarly subject to the president,
nly is it an executive department, but, as the presi-
s commander in chief of the army, he may make regula-
s and issue orders independently of Congress. The Secretary of War, almost invariably a civilian, and in the recent administrations a lawyer, is charged not merely with the management of military affairs, but with the construction of public works, the improvement of rivers and harbors, and, since the War with Spain, with the administration of the Philippines and our insular possessions. During certain administrations considerable friction has arisen between the general commanding the army and the civilian secretary. To remedy this, as well as to bring the department to a higher state of efficiency than was disclosed by the War with Spain, Secretary Root in 1903 procured legislation reorganizing the department and creating the General Staff.

The General Staff

The General Staff is composed of officers, of all grades above lieutenants, detailed by the orders of the president for terms of four years. The duties of the General Staff are to prepare plans for national defense and for the mobilization of the forces of the United States, to make recommendations for increasing the efficiency of the army, and to give professional advice to the Secretary of War and to the officers of the army.

The complicated administration of the department is conducted by bureaus and offices, whose titles in general indicate the duties assigned them.[1] Two bureaus, however, should be more fully explained, as they deal with work which is not of military character.

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[1] The Department of War is organized as follows: Secretary, Assistant Secretary, Assistant and Chief Clerk; five divisions — Correspondence, Mail and Record, Requisitions, Supply, Telegraph; the General Staff; Office of the Chief of Coast Artillery; eleven military bureaus — Adjutant General, Inspector General, Judge-Advocate-General, Quartermaster-General, Surgeon-General, Chief of Engineers, Chief Signal Officer, Chief of Ordnance, Militia Bureau; the Bureau of Insular Affairs; Board of Ordnance and Fortification.

Corps of Engineers

The Corps of Engineers is charged not merely with the duties which would naturally belong to such a bureau — that is, the construction of fortifications, military bridges, and the like — but also with the vast works which are undertaken in the improvement of rivers and harbors and with the construction of dams and reservoirs connected with the reclamation policy of the government. The most spectacular and important piece of work has been the construction of the Panama Canal. The work upon this was initiated under private engineers, several of whom resigned, feeling themselves unable to continue the work under the conditions imposed by the government. President Roosevelt then transferred the work to the Department of War and made Colonel Goethals, one of the engineer corps, head of the Canal Commission and in charge of all the work of construction and the government of the zone. In spite of the fact that the plans of the canal were changed and the work enlarged, the construction was completed before the time set, and the Canal opened for merchant vessels a year before the formal opening was originally planned. Connected with the Corps of Engineers is the Board of Engineers for Rivers and Harbors. This is a permanent body created by the act of 1902. To it are referred all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for work on rivers and harbors upon which a report is desired by the Chief of Engineers. The intention was to make this an advisory body to check and prevent the extravagant undertakings suggested to Congress. Should Congress follow its recommendations much would be accomplished, but too often political and personal considerations weigh more than the recommendations of the Board.

The Panama Canal Commission

Board of Engineers for Rivers and Harbors

Bureau of Insular Affairs

The Bureau of Insular Affairs was an outgrowth of the acquisition of the territory from Spain in 1898. It is charged with all matters pertaining to the civil government of the insular possessions of the United States, assigned to the War Department.

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[1] The Bureau of the Adjutant General is charged with records, orders, regulations, and instructions; the Judge-Advocate's office is charged with the review of courts-martial and legal proceedings; the duties of the others are obvious.

At present it has charge of the Philippines and Porto Rico. The Bureau receives the records of the civil government, acts as comptroller in reviewing the receipts and expenses, attends to the purchases and supplies for those governments, and has charge of the appointments of persons in the United States to the Philippine civil service and arranges their transportation.

THE DEPARTMENT OF JUSTICE[1]

The office of Attorney-General of the United States was created by the Judiciary Act of 1789, although for several years the duties did not require all the time of the incumbent and he was allowed, if not expected, to engage in private practice. Although the Attorney-General was included by Washington in the number of those who were his cabinet advisers, the Department of Justice was not organized until 1870.

The Attorney-General the legal adviser of the president and the administration

The functions and duties of the Attorney-General and the Department of Justice are fourfold: (1) The Attorney-General is the legal adviser not merely of the president but of the administration. As such he is frequently called upon to give his opinion on questions concerning the construction of the Constitution and of the laws, not only to the president but to the heads of the departments as well. These opinions involve a double character: they are quasi-judicial rulings, and they also very frequently determine the political policy of the administration. As quasi-judicial rulings the opinions of the Department " . . . officially

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[1] The Department of Justice is organized as follows: the Attorney-General, the Solicitor-General, the Assistant to the Attorney-General, six Assistant Attorneys-General, Assistant Attorney-General for customs division, Special Assistant to the Attorney-General for war work, Chief Clerk, Chiefs of the divisions of Accounts and Investigation, Superintendent of Prisons, seven solicitors for the various departments In Washington there are over fourteen hundred positions in the Department, of which only two hundred and fifty-six are competitive, while over three hundred are noncompetitive and over eight hundred presidential Outside of Washington there are over twenty-seven hundred positions, of which only about six hundred are competitive. The reason for the large proportion of noncompetitive positions is probably because of the high grade of professional skill required, the intimate connection of the duties with the political policy of the administration, and the confidential nature of the work. It must be admitted, however, that the United States marshals, and their subordinates, have neither confidential nor professional work to perform, but are very frequently purely political appointees.

The opinions of the Attorney-General define the law and in many instances are conclusive

define the law, in a multitude of cases, where his decision is in practice final and conclusive — not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts, but also in questions of private rights, inasmuch as parties having concerns with the government possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney-General. Accordingly, the opinions of successive Attorneys-General . . . have come to constitute a body of legal precedents, having authority the same in kind, if not the same in degree, with the decisions of the courts of justice." [1] In other words, the opinions of the Attorney-General interpret the Constitution and statutes of the United States as far as the action of the officers thereof is concerned. To him are referred doubtful points and questions of jurisdiction, and the action of the officials is governed by his ruling. In addition, as the above quotation shows, his opinion often affects private rights. It has been pointed out that the government of the United States can be sued only with its own consent and that the jurisdiction of the Court of Claims is very restricted; hence the opinion of the Attorney-General is often the only legal decision which a private individual can obtain. "The Supreme Court will not entertain an appeal from his decision, nor revise his judgment in any case where the law authorized him to exercise his discretion or judgment." [2]

The opinions of the Attorney-General may determine the political policy of the government

These opinions, although quasi-judicial in their nature, often have great effect in determining the political policy of the government. For example, officials of the United States Steel Corporation obtained from the Attorney-General through President Roosevelt the informal opinion that the acquisition of one of their competitors was not in violation of the laws prohibiting restraint of trade. This opinion was adopted by President Roosevelt, no action being taken against the corporation during his administration; and this also served to indicate the political attitude of the government. President Taft, however, followed different advice, and his Attorney-General instituted a suit against the Steel Corporation.

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[1] J. A. Fairlie, The National Administration of the United States, pp. 166, 167, quoting opinions.

[2] Ibid. p. 167, quoting from 6 Atty-Gen. Opin. 346.

The Attorney-General has supervision over or personally conducts suits to which the United States is a party

(2) The Attorney-General is the chief advocate of the government. As such he has supervision over all suits to which the United States is a party. In the lower courts the conduct of the cases is usually intrusted to the local district attorney of the judicial district in which the suit is commenced; and until the cases reach the Supreme Court or the Court of Claims the Attorney-General's office only gives supervision and direction. Cases in the Supreme Court and the Court of Claims, however, are conducted by the Attorney-General or some of his assistants. After the Attorney-General, the most important officer in the department is the Solicitor-General. He acts in the absence of the Attorney-General and has general charge of the preparation of suits before the courts.

The Solicitor-General

The Attorney-General the chief prosecuting officer

The Attorney-General and the district attorneys are also the prosecuting officers of the United States. They conduct criminal prosecution for violations of the laws of the United States, particularly those relating to banking, currency, and revenue. In recent years, however, the activity of the government has been so widely extended, and different departments have been charged with so many specific duties, that special solicitors are assigned to these departments. This is particularly true with regard to the laws prohibiting monopoly — the anti-trust laws. As has been shown, there has been a difference of opinion concerning their interpretation and application; but during the administrations of Presidents Taft and Wilson suits have been brought to a successful conclusion against some of the largest corporations in the country. The conduct of these is under the direction of the Attorney-General's office, but the preparation of the suit, the preliminary investigations, and the trial in the lower courts are frequently assigned to attorneys especially employed for the purpose.

Different policies concerning trusts

(3) The Department of Justice is charged with supervision of the prosecuting and executive officers of the United States courts; that is, with the district attorneys and marshals. Unlike

the head of the judicial department in England, the Lord Chancellor, the Attorney-General has no official voice in the selection of the judges and certainly no control; but over the assistant attorneys and the district attorneys he has the same control that is exercised by the heads of other departments. He thus has considerable voice in the distribution of a large amount of patronage. When it is remembered that the majority of the officers in the department are presidential — that is, appointed by the president upon confirmation by the Senate — and are not competitive or classified, it will be seen that the influence of the Attorney-General may be felt in matters which are legal or judicial. It is in this department that the Democratic administration of 1912 made one of its boldest attacks upon the merit system in exempting from the civil service rules all employees in the marshal's offices, from messengers up to deputy marshals. In the control of the district attorneys the Attorney-General may direct that a particular suit be pressed, dismissed, or postponed. From his directions there is no official appeal. Unofficially, appeals have been made to the president or to public opinion with such effect that the orders have been reversed.

The Attorney-General has control of the assistant attorneys and district attorneys

Political importance

The United States marshals

The United States marshals have the same powers in executing the laws of the United States as the sheriffs have in enforcing the laws of the respective states. There are eighty-six marshals and a number of assistants and deputies. It is their duty to attend the sessions of the district courts and execute all legal processes directed to them under the authority of the United States. The marshals and their assistants and deputies make arrests, carry out the judgment of the court by seizing and selling the property under civil judgments, and under certain circumstances may call upon the military forces of the United States to aid them in the exercise of their duties.

The Department of Justice has administrative control of national penal institutions

The Department of Justice also has administrative control over the penal institutions of the United States. There are two national penitentiaries, one at Leavenworth, Kansas, and one at Atlanta, Georgia; there are also a jail and two reform schools in the District of Columbia. In these institutions convicted offenders against the laws of the United States are confined, although the national government makes some use of state penal institutions.

The Attorney-General consulted in pardons

(4) The Attorney-General is also the adviser of the president in the exercise of his pardoning power. A special staff of subordinates is assigned for this purpose.[1]

THE POST-OFFICE DEPARTMENT[2]

Organization of the Post-Office Department

The Post Office, an inheritance from pre-Revolutionary days, was at first classed as a branch of the Treasury, but became a cabinet office in 1829. In its organization it differs somewhat from the other departments in that its chief, the Postmaster-General, reports directly to Congress — in which respect he resembles the Secretary of the Treasury — and that the auditor assigned to it certifies the balances due the service directly to the Postmaster-General rather than to the Secretary of the Treasury as do the auditors for the other departments. There are four Assistant Postmasters-General, each in charge of an office with numerous divisions. Unlike the post-office department in England there was until 1917 no attempt to gain a surplus revenue from the service. Only four times since 1900 have the receipts equaled the expenses, the policy being to improve, extend, and cheapen the service rather than to obtain a net income. From 1917 to 1919, however, as a part of the war finance, the postage rates were increased with the intention of producing surplus revenue for the Treasury.

Magnitude of its operations

The Post-Office Department is the largest and the most widely distributed of all the departments, and in its operations it comes into touch with practically the entire population. For the transportation of the mails it maintains over twelve thousand mail routes, aggregating over two hundred and eighty-six million miles. These routes include the rural mail delivery routes, the city routes, the steamboat routes, and the railroad routes. In 1917 there were over fifty-five thousand post offices. The Post-Office Department performs not merely the functions of transporting the mail but also collects and delivers it. In 1904 this service was extended by "the rural free delivery service" to country districts, and at present over one half of the population of the country are within reach of free delivery of some sort.

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[1] See p. 198.

[2] The organization of the department is as follows: Postmaster-General, Chief Clerk, Solicitor, five Assistant Attorneys; four Assistant Postmasters-General, each of whom presides over an office, in each of which are divisions. In the office of the Third Assistant Postmaster-General is the division of Postal Savings, over which there is a Director.

Parcel post

Aside from the transportation of letters and printed matter, the facilities of the postal service were in 1913 extended to parcels of merchandise. In making this extension there was adopted a system which was novel in the United States. Instead of charging a flat rate based upon weight for any distance throughout the country, the country was divided into "zones" and the rates varied not merely with the weight of the parcel but also with the distance it was carried. The growth of this branch of the service has been extraordinary, and the revenue gained from it, although at first not sufficient to pay the cost, was held sufficient to justify an increase of the maximum weight. As part of the War Revenue Act of 1917 parcel postage was taxed at the rate of one cent for every twenty-five cents postage.

Postal savings

In 1912 a system of postal savings banks was inaugurated, which was further extended in 1914. By this system postmasters are authorized to open accounts for one dollar or more, but the depositors are limited to twenty-five hundred dollars at any one time, exclusive of interest. Interest is paid at the rate of 2 per cent per annum upon the amounts deposited for a year, but not fractions of a year. On June 30, 1917, there were nearly seven hundred thousand depositors with one hundred and thirty-one million dollars to their credit. The system is now more than self-supporting, yielding a profit of nearly a million dollars in 1917.

Registered letters; money orders; special delivery

The Post Office also performs other services, such as registering letters, by which the transportation and delivery are subject to special attention; the money-order system, by which money may be deposited at one post office and an order obtained payable to the person to whom the order is sent; the special-delivery system, by which mail matter is delivered immediately upon its receipt at certain offices within certain distances. For all these services extra fees are charged in addition to the regular postage rate.

The immense number of employees in the Post-Office Department and the opportunity to extend political influence early attracted the attention of the spoilsmen. The Post Office and

Extension of the classified service in the Post-Office Department

Treasury have been the two departments which have been most constantly used for the purpose of gaining or extending political influence; and the reform of the civil service was applied almost simultaneously to these departments. At present the classified service extends to the railway mail service, rural delivery, and all clerks and carriers; and President Roosevelt and President Taft extended it to fourth-class postmasters, while in 1917[1] President Wilson by executive order prescribed a civil-service examination for all first-, second-, and third-class postmasters. This, however, does not alter the power of the Senate to reject the nominees so chosen, so that it can hardly be said that these classes are completely removed from political patronage and placed in the classified service.

THE DEPARTMENT OF THE NAVY[2]

Activities of the Department of the Navy confined to naval affairs

Unlike the War Department, the Department of the Navy is confined almost entirely to the administration of naval affairs. Its bureaus and divisions are concerned with the duties which are made plain by the titles, and there are no bureaus which are engaged in work unconnected with the navy.

Office of Naval Operations

One office, however, should be examined — the Office of Naval Operations. This consists of the Chief of Naval Operations, Assistant for Operations, Aid to the Admiral, Assistant for Matériel, and Chief Clerk. By the act of 1915 the Chief of Naval Operations ranks next to the Secretary and Assistant Secretary and in their temporary absence acts as head of the department. The chief is charged with the operations of the fleet and with the preparation and readiness of plans for its use in war. This includes the direction of the Naval War College, the Office of Naval Intelligence, and the offices concerned with more technical questions. The Chief of Operations prepares

Chief of Naval Operations

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[1] March 31.

[2] The organization of the Department of the Navy is as follows: Secretary, Assistant Secretary, Chief Clerk, the Office of Naval Operations, the Office of Judge Advocate, the Office of the Solicitor, and seven bureaus — Navigation, Yards and Docks, Ordnance, Construction and Repair, Steam Engineering, Supplies and Accounts, Medicine and Surgery. There are also various boards to which duties are assigned, and directors of the hospital and dispensary In addition, there is the Marine Corps under its Commandant, a Major General who is responsible to the Secretary for the efficiency of the corps.

the regulations for the government of the navy, the Naval Instructions, and the General Orders. He advises the Secretary concerning the movements of ships, and in regard to the military features of all new ships and alterations of old ones. He freely consults with and has the advice of the various bureaus, boards, and offices of the department.

The Marine Corps

The Marine Corps was organized in 1775 and reorganized in 1794. It was a body of troops of the authorized strength of thirty thousand who served upon ships or garrison fortifications. It is under the direction and command of the Commandant of the Marine Corps, who is responsible to the Secretary of the Navy. Because of serving on naval vessels detachments of the Marine Corps are frequently the first to be sent to any scene of trouble. Thus the Corps has served in all parts of the world and everywhere showed its efficiency and worth. During the World War it was recruited to a strength of nearly eighty thousand.

THE DEPARTMENT OF THE INTERIOR[1]

The Department of Interior charged with miscellaneous functions

The Department of the Interior was organized in 1849 by the transference and consolidation of various bureaus from other departments. It is charged with a great many miscellaneous duties not usually found in such departments abroad, while it has few or none of the duties usually assigned to departments of similar names. From the Department of State was taken the Patent Office; from the Treasury, the Land Office; from the War Department, the Indian Bureau and the Pension Office; and minor duties were transferred from other departments. The organization is that of a typical department, except that the chief officers are usually entitled Commissioners.

The Patent Office

The Constitution allows Congress to make laws "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[2] Acting upon this, the first patent law was passed in 1790, and the issuing of patents was intrusted to a board consisting of the Secretary of State, the Secretary of War, and the Attorney-General. In 1836 radical changes were made, and the system in use at present was initiated, with a bureau called the Patent Office in charge of the Commissioner of Patents. Patents are issued upon application of the inventors after examination by a corps of expert examiners, who pass upon the novelty of the invention and the possibility of infringement upon other patents. Designs may also be patented and trademarks registered. The judgment of the Commissioner is final, appeal lying to the Supreme Court of the District of Columbia and thence to the United States Supreme Court. Much complaint has arisen over the expensiveness and delay of patent litigation, and in 1912 the Supreme Court revised the rules of equity procedure under which patent suits are prosecuted. In recent years popular opinion has been aroused against the system whereby the holders of patents attempted to fix the price of the articles and to surround its use with conditions. This has been partially remedied by the Clayton Law of 1914.[1] The total number of patents issued up to 1917 was over a million.

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[1] The Department of the Interior is organized as follows: Secretary, two Assistant Secretaries, Chief Clerk, the Land, Indian, and Patent Offices; and the following bureaus — Pension, Education, Mines; the Geological Survey, the Reclamation Service, and the National Park Service.

[2] The Constitution of the United States, Article I, Sect. viii, clause 8.

The Land Office

One of the most important bureaus of the department is the Land Office. Most of the territory of the United States, outside of the original thirteen states and insular possessions, has been at one time or another public land, held and controlled by the government. On the continent of America there has been over two million nine hundred and twenty-five thousand square miles of public land out of a total of over three million five hundred thousand square miles. This domain has been disposed of in many ways: grants to soldiers and sailors, sales to land companies, sales to settlers, homestead grants, grants to states, grants to states for the purpose of education or making internal improvements, grants directly to railroads, and other corporations to aid in improvements, and reservations for Indians. In the fifty years following the Civil War the disposal of the public land was very rapid, the government granting or selling over three hundred and twenty-four million acres. At present the public domain consists of about two hundred and thirty million acres scattered through twenty-five states, but not including the vast public domain of Alaska. The disposal of this vast amount of land has not been unattended with fraud. The classification of land, as mineral, timber, agricultural, or grazing, has been only very imperfectly carried out; and many fictitious entries of small homesteads have been combined to create enormous holdings for purposes not sanctioned by law, while the waste with regard to forest land has been extravagant. In recent years the survey and classification have been performed with greater care. During 1917 the total classified land amounted to more than eighteen million acres.

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[1] See pp. 517–519.

Classification of public land

The Land Office has been and still is charged with the survey and classification of the public land and with its disposal. Outside of Washington it maintains about a hundred land offices, where claims for public land may be entered and proved, and patents issued. The policy of the government in the disposal of its public land has not been a financial success, the system having cost more than the returns have produced, but the rapid expansion of the West and the settlement of the country have resulted in adding so much wealth to our resources that the policy may have been justified. At present the conservation of the remaining public land is very much before Congress. By this is meant the careful survey and classification of the land and the enforcement of laws concerning the acquisition of mineral lands and land controlling water-power sites, so that the government may supervise to some degree the sale of their products. This policy is very popular in the East and in those states where there is no public land, but is opposed by those states in which the government still holds large amounts of land. To such states it seems that the government should continue the policy of opening up the land as rapidly as possible, thereby increasing settlement and the taxable wealth of the states instead of holding the land and thus withdrawing from state taxation a large proportion of its resources.

Conservation of public land and resources to supervise sale of products

Closely connected with the Land Office in purpose, although not in administration, is the Reclamation Service. This service is charged with the survey and construction of irrigation works in arid or semiarid regions. The work was begun in 1902 on

The Reclamation Service

a large scale, and up to 1917 nearly one hundred million dollars had been invested in such projects. By the Newlands Reclamation Act, under which the service was first inaugurated, the lands so reclaimed were sold to settlers, who paid for them in annual installments, thus restoring to the fund the money which was expended for the construction of the project. In addition, land already privately owned may receive the benefit of the service on the payment of a fee. The construction of reservoirs with dams makes it possible, by the water power thus generated, to produce electric power, which is also sold. In 1913 there were twelve such power plants capable of producing over thirty thousand horse power. The total number of acres the service could supply in 1918 was one million five hundred thousand, of which over a million acres were actually irrigated.

Indian Office

Indian affairs are managed by a commissioner presiding over a bureau, together with a large number of agents and employees. The duty of the Indian Office involves not merely the control of the Indians upon the government reservations and their education, both there and at schools specially maintained for them, but the administration of the great wealth represented in their lands. Some of these lands are held by tribes and are still utilized for hunting, grazing, or rudimentary agriculture; others have been allotted to individuals with restrictions upon their sale; still others have been sold outright and the funds administered for the benefit of the tribe.

The Pension Office

The Pension Office is under the direction of the Commissioner of Pensions, assisted by a deputy commissioner and a large body of clerks, agents, and minor employees. This bureau examines the claims, preserves the records, and makes payment in accordance with the general law and the special statutes. In the matter of pensions the United States has been most generous, if not profligate. Until the Civil War the annual payments seldom exceeded two million dollars a year. In 1862 an invalid pension law and the effects of the Civil War increased the annual payments to over twenty million dollars a year. The law of 1879, providing for back payments to new pensioners, increased the appropriations to eighty-eight million dollars in 1889; and the dependent pension bill of 1890, together with thousands of special bills, still further increased the amount, while the service pension bill of 1912 made the payment of 1913 over one hundred and seventy-four million dollars. Altogether the bureau has disbursed since 1866 nearly five billion dollars. In 1916 there were upon the rolls four hundred thousand persons who had rendered service in army or navy, regular or volunteer, while the remainder of the names, three hundred thousand, were those of widows or dependents. The general laws, generous enough in themselves, are annually supplemented by thousands of special bills whose claims have been rejected by the bureau.

The Commissioner of Education

The Commissioner of Education collects statistics and general information concerning the condition of education, issues an annual report and numerous bulletins, has charge of the education of the native children in Alaska, supervises the reindeer industry, and administers certain funds for the support of colleges for the benefit of agriculture and mechanic arts.

The Bureau of Mines

The Bureau of Mines is charged with the investigations of the methods of mining, especially in relation to the safety of the miners. The bureau also investigates the treatment of ores and other mineral substances and the use of explosives and electricity. The Director of the bureau has supervision over the mine inspector in Alaska and the administration of the act of 1917, which prohibits the manufacture, distribution, storage, use, and possession in time of war of explosives and provides regulations for the same.

THE DEPARTMENT OF AGRICULTURE[1]

Origin of the Department of Agriculture

The Department of Agriculture has its origin in the distribution of seeds begun in 1836 by H. L. Ellsworth, Commissioner of Patents. This work, together with the publication of agricultural statistics, was continued by successive commissioners until

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[1] The Department of Agriculture is organized as follows Secretary; two Assistant Secretaries; Chief Clerk; Solicitor who has important duties in enforcing the Pure Food and Drugs laws; nine bureaus — Weather, Animal Industry, Plant Industry, Chemistry, Soils, Entomology, Biological Survey, Crop Estimates, Markets; the Office of Farm Management; the Forest Service; States Relations Service; Office of Public Roads and Rural Engineering, Insecticide and Fungicide Board, Federal Horticultural Board; two divisions — Accounts and Disbursements, and Publications.

1862 when an independent bureau of agriculture was established, and from that date its functions expanded so rapidly that in 1888 it was made an executive department with cabinet rank. The department is one of the most highly organized of all the executive departments and performs varied services.

The Weather Bureau

The Weather Bureau has charge of weather forecasts, including the display of warnings of storms, cold waves, frosts, and floods, for the benefit of agriculture and navigation. It also gathers statistics which it receives from over three thousand localities, makes meteorological observations, and reports the temperature and rainfall conditions for agricultural districts. Its forecasts of climatic conditions are distributed to over two hundred thousand places.

The Bureau of Animal Industry

The Bureau of Animal Industry has charge of the supervision of dangerous communicable diseases of live stock and the inspection of animals and products of animals in transit. It acts in connection with the Solicitor regarding meat inspection and the establishment of quarantines. In addition, it has charge of dairy products for foreign exportation and inspects the manufacture of renovated butter.

The Bureau of Plant Industry

The Bureau of Plant Industry carries on scientific investigations of plant life, with the view of preventing diseases and increasing the fertility of the soil, and recommends the introduction of new species. This bureau also continues to direct the seed distribution, sending out about forty million packages of assorted seeds each year upon the orders of members of Congress. The bureau has divisions for farm management, western agricultural work, farmers' demonstrations, and dry-land agriculture.

The Bureau of Chemistry

The Food and Drugs Act

The Bureau of Chemistry is one of the most far-reaching and important of all the bureaus. It is divided into three great divisions — Foods, Drugs, and Miscellaneous — and has charge of the enforcement of the Food and Drugs Act of 1906. Although the federal government since 1890 has inspected cattle for export and established quarantines in case of contagious diseases of live stock, the great activity in this line began in 1906 as a result of the revelations of the conditions in the packing- and slaughter-houses. The interest was not confined merely to live stock but was extended to foods of all sorts and to drugs. The laws require the federal inspection of all live stock slaughtered for use in foods, which is to be shipped outside the state boundaries. Such meat and manufactured products bear the federal inspection stamp guaranteeing that they have been prepared under proper hygienic conditions and that the articles correspond with the brand upon the package. Two objects are thus accomplished — the product has been inspected with regard to its purity, and frauds of misbranding are prevented. Another law extends the same principles to drugs or proprietary compounds. This provides for the analysis of the drug or compound and a truthful labeling of its contents. It furthermore requires that the presence of alcohol, opiates, and preservatives shall be indicated upon the label. Although much of this work is under the charge of the Bureau of Chemistry, the Bureaus of Animal Industry and Plant Industry are also interested. Attempts are made to secure standards for live stock and seeds, and in connection with the latter to prevent adulteration.

Inspection of food

Correct branding

Drugs

The sanction for this legislation is found in the interstate commerce clause of the Constitution, and the foregoing regulations need only be complied with in case the article is to be shipped outside of the state where manufactured; but as practically all trade crosses at least one state line the federal laws are almost universally enforced. The enforcement of the law has brought about a great extension of activity on the part of the central government and an invasion of a field formerly exclusively occupied by the states. The enforcement has also involved the department in many controversies; for example, the determination of the once vexed question, "What is whisky?" and the determination of whether preservatives were harmful or not. The bureau has many scientific and technical laboratories investigating these questions, and their determinations are subject to the review of the Referee Board of Consulting Scientific Experts; and then the enforcement of them is in the hands of a solicitor detailed from the Department of Justice.

Sanction for this activity in the interstate commerce clause

Enforcement of the law

The Bureau of Entomology makes investigations with regard to injurious insects affecting crops, fruits, or forests, and their relation to the diseases of man. The Bureau of Soils issues maps showing the nature of the soil in all portions of the country

Bureau of Entomology

Bureau of Soils

Bureau of Crop Estimates

Bureau of Biological Survey

Office of Farm Management

State Relations Service

Office of Public Roads and Rural Engineering

Bureau of Markets

and makes suggestions for methods of improvement. The Bureau of Crop Estimates reports, gathers, and publishes statistics concerning agriculture. It acts in cooperation with nearly fifty thousand agents. The Bureau of Biological Survey investigates the economic relations of birds and mammals, has charge of the enforcement of the game laws in the federal reservations, and administers the federal migratory bird law. The Office of Farm Management studies the details of farm practice with the intention of introducing better business methods. The State Relations Service represents the Secretary of Agriculture in his relations with state agricultural colleges and experiment stations, under an act granting funds to these institutions for certain work in the way of experiment stations, and cooperative extension work. The Office of Public Roads and Rural Engineering administers the federal-aid road act, which grants to states aid in building post roads in accordance with federal supervision. The Bureau of Markets disseminates information concerning the marketing of products. In its service the bureau issues daily reports, giving information regarding the supply, commercial movement, disposition, and prices of fruits, vegetables, live-stock, meats, and dairy and poultry products.

Forest Service

Aims of conservation movement

Classification of land

The Forest Service, established in 1877, has recently been brought before the public attention through the enthusiastic activities of President Roosevelt and Gifford Pinchot, former Forester of the United States. The service is performing a portion of the general conservation program, portions of which are given to the Land Office and the Reclamation Service. The importance of forestry work was brought graphically to the attention of Congress by one of President Roosevelt's messages. The aims are twofold: first, to prevent the extravagant and wasteful use of timber, to guard against the danger of fire, to reforest those regions already denuded; second, to preserve the forests as a means of preventing floods which almost invariably follow deforestation. Many questions and policies apparently unconnected with forestry have risen in the enforcement of the regulations. For example, the classification of land — should it be forest, agricultural, or mineral? It is obvious that mineral land and agricultural land are of more immediate value than that reserved for forests, and the pressure is constant that the land withdrawn for forests should be opened for other purposes. Since the sources of many streams are in the national forests, the question arises whether the national government should control or have supervision over the sites suitable for water-power developments. If the land is withdrawn from the forest and granted to private individuals or companies, the government naturally loses the power to regulate and control the use of the water power and its product — electricity. The aim has been to grant limited franchises, giving the government certain rights of control, with the power to revoke the grant under certain conditions. The use of the national forests is also one which involves considerable friction. The enforcement of governmental regulations with regard to cutting timber and use of the forests for grazing frequently brings the forest agents into conflict with local public opinion. This service is primarily concerned only with forests upon the public domain, but it cooperates with states in the attempt to extend its purposes.

Control of water power

At present there are one hundred and fifty national forests in the United States besides the Appalachian forest reserve in process of creation in the East. In 1909 these reservations contained nearly two hundred million acres, but with a redefinition of the boundaries and the reclassification of the lands they amount now to about one hundred and fifty-five million acres. The work of the government is to protect them against fire, encroachment, theft of timber, and also to supervise scientific lumbering so that a steady revenue may be derived without exhausting the resources of the forest. For the year ending June 30, 1918, the forest receipts were over three million five hundred thousand dollars.

The national forests

THE DEPARTMENT OF COMMERCE [1]

The Department of Commerce and Labor was created in 1903, and from it three bureaus were taken in 1913 to form a Department of Labor. The Department of Commerce still retains the management of the following important work:

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[1] The Department of Commerce is organized as follows: Secretary, Assistant Secretary, Chief Clerk; three divisions — Appointments, Publications, Supplies; six bureaus — the Census, Foreign and Domestic Commerce, Standards, Lighthouses, Fisheries, Navigation; the Coast and Geodetic Survey; Steamboat Inspection Service.

[The Bureau of Corporations]

In the last quarter of the nineteenth century a general consolidation of industrial corporations took place. By one means or another the principal industries of the country were combined into what was popularly known as "trusts," or by the creation of large corporations. In 1890, in an attempt to check or control this process, the Sherman Anti-Trust Law was passed, by the provisions of which it was declared that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and with foreign nations was illegal. The act also provided penalties for the violation of its provisions. Although this act was on the statute book for over ten years, little was done toward enforcing it. In 1903, upon the recommendation of President Roosevelt, a Bureau of Corporations was established for the purpose of gathering information concerning the organization and operation of business corporations engaged in interstate trade, other than those which were under the jurisdiction of the Interstate Commerce Commission. The information so gathered was made public, and this policy of "efficient publicity" was so effective that many of the practices complained of were remedied. In 1914 the Bureau of Corporations was abolished and its functions were transferred to the Federal Trade Commission.

The Bureau of Foreign and Domestic Commerce

The Bureau of Foreign and Domestic Commerce publishes daily information obtained by consular reports and other sources concerning home and foreign markets. Its duty is to aid and foster trade in every way possible.

The Bureau of Lighthouses

The Bureau of Lighthouses has under its jurisdiction the establishment and maintenance of lighthouses, lightships, buoys, and other aids to navigation.

The Bureau of the Census

The Bureau of the Census is charged with taking the decennial census required by the Constitution. From the first these censuses have been more than mere enumerations of the population, and have sought to gather useful and significant statistics. The last census of 1910 made inquiries upon the population schedules concerning literacy, employment, and so forth; while information concerning agriculture, manufactures, and mining was given, and an investigation of local finances was made. The results of these investigations are published in a series of volumes and give a valuable statistical picture of the population, resources, and activities of the country. Although the census is taken once every ten years, the census office is in constant operation, obtaining, tabulating, and publishing the information it has obtained.

The Bureau of Navigation

The Bureau of Navigation has oversight of the merchant marine and seamen. It issues registers and licenses, and through the customs officers enforces navigation and steamboat laws.

The Steamboat Inspection Service

The Steamboat Inspection Service had its origin in 1838 as the result of a number of appalling boiler explosions. At present there is one inspector, ten traveling supervising inspectors, with local inspectors at every important port. Inspections are made not merely of the boiler but of the hulls of both steam and sailing vessels. In addition, this service enforces the provisions requiring adequate life preservers and lifeboats.

The Geodetic Survey

The Geodetic Survey makes accurate surveys of the coasts of the United States and its dependencies, publishes charts, tide tables, coast pilots, and information helpful to mariners.

The Bureau of Fisheries

The Bureau of Fisheries is charged with the investigation of the causes of decrease in fish, the propagation of useful food fishes, the administration of the salmon fisheries of Alaska, and the fur-seal herd of the Pribilof Islands, and the fur-bearing animals of Alaska.

The Bureau of Standards

The Bureau of Standards has the custody of the standards used in commerce, scientific and educational institutions, and in manufacturing. It tests standards and compares them with the official ones in its custody.

The Department of Labor[1]

The Department of Labor was created in 1913 by the transfer of certain bureaus from the Department of Labor and Commerce.

The Bureau of Immigration

The Bureau of Immigration has charge of the enforcement of the immigration laws of the United States. This duty is under a Commissioner-General of Immigration, who is assisted by commissioners at the principal ports and a large number of agents and subordinate officials. These officials are intrusted both with the physical examination of the immigrant and the determination of whether he falls within one of the excluded classes. As has been seen, their decision is subject to a series of appeals to higher officials ending, however, with the Secretary of Labor, from whose decision there is no appeal nor is there a judicial review. The service is in part supported by a tax levied upon entering immigrants.

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[1] The Department of Labor is organized as follows: Secretary, Assistant Secretary, Chief Clerk, Solicitor; four bureaus — Immigration, Naturalization, Labor Statistics, Children; and the United States Employment Service.

The Bureau of Naturalization

The Bureau of Naturalization is charged with oversight of the enforcement of the naturalization laws. It supervises the work of the courts in naturalization matters, stimulates the preparation of candidates for naturalization, and is the repository for the applications, preliminary papers, and the duplicates of the naturalization certificates.

The Bureau of Labor Statistics

The Bureau of Labor Statistics is charged with the gathering of statistics relating to labor, the investigation of the causes of and the facts relating to controversies and disputes between employers and employees, and the publication of bulletins showing the condition of labor in this country and in others.

The Children's Bureau

The Children's Bureau investigates and reports upon all matters pertaining to the welfare of children and child life among all classes.

DETACHED MISCELLANEOUS BUREAUS

The most important and active of these detached bureaus are the Interstate Commerce Commission, the Federal Trade Commission, the Federal Reserve Board, and the Civil Service Commission, but the composition, organization, and work of these are discussed at length elsewhere.

The Public Printer

The Public Printer has charge of and manages the Government Printing Office. Here are printed all the vast number of documents, reports, and papers that are considered necessary for the government. The Joint Committee on Printing, composed of three senators and three representatives, exercises some control over the printing of reports, and has charge of the printing of the Congressional Record, which is issued daily during the sessions of Congress.

The Smithsonian Institution

The Smithsonian Institution was created to receive the bequest of James Smithson, an Englishman, who, in 1826, left his fortune for the foundation of an institution for the "increase and diffusion of knowledge among men." It is governed by a Board of Regents consisting of the Vice President, the Chief Justice, three members of the United States Senate, three members of the House of Representatives, and six citizens of the United States appointed by a joint resolution of Congress. The secretary is the executive officer and the director of the activities of the institution. The institution in cooperation with the Library of Congress maintains a library. There are the following government bureaus under the direction of the Smithsonian Institution: the National Museum, Bureau of American Ethnology, National Zoological Park, International Exchanges, Astrophysical Observatory, Regional Bureau for the United States, International Catalogue of Scientific Literature.

The Pan-American Union

The Pan-American Union is the official organization of the twenty-one republics of the Western Hemisphere, founded and maintained by them for the purpose of exchanging useful information and fostering commerce, intercourse, friendship, and peace. It is supported by the joint contributions of the republics which are members. It is governed by the diplomatic representatives of the various states at Washington with the Secretary of State as chairman ex officio. It publishes monthly bulletins, handbooks, and descriptive pamphlets, commercial statements, and every variety of information helpful in the promotion of Pan-American interests. It also sets the date, selects the place of meeting, and prepares the programs for the regular Pan-American conferences.

The United States Bureau of Efficiency

The United States Bureau of Efficiency is to establish and maintain efficiency rating for the executive departments in the District of Columbia.

The United States Shipping Board

The United States Shipping Board was established as a war measure in 1916 to construct, equip, purchase, lease, or charter vessels suitable for use as naval auxiliaries in time of war, and it may lease, sell, or charter such vessels, under the regulations provided by the president, to citizens of the United States. The board is authorized to organize one or more corporations for the purchase, construction, lease, or charter of vessels. It also has some supervision over common carriers in that certain contracts and agreements must be filed with the board, and complaints may be made to it. It consists of five members appointed by the president, with power to appoint its own secretary and naval architects, special experts, and examiners. Other employees are under the civil-service regulations.

The Alien Property Custodian

The Alien Property Custodian had power to receive, manage, or sell the property of enemy aliens. Under this power a large number of very important industries were taken from their owners and were administered or sold under the regulations of the custodian.

The United States Tariff Commission

The United States Tariff Commission was appointed by act of Congress in 1916 to investigate the administration, operation, and effects of the customs laws and their relation to the federal revenues. The information which this commission collects is to be put at the disposal of the president, the Ways and Means Committee of the House, and the Finance Committee of the Senate.

CHAPTER XI

THE CONSTITUTIONAL PROVISIONS CONCERNING THE ORGANIZATION OF CONGRESS[1]

The significance of the word "Congress" as the legislature of a federal state

The employment of the word "Congress" to designate the legislative assembly of the United States was not accidental. Deliberate design and precedent alike suggested the name. The meetings of the colonial governors, the gatherings which preceded the Revolution, and the assembly of the Confederation were all so designated. But more important than precedent, the formation and design of the body demanded the choice of a name which should distinguish it from the old colonial assemblies and the legislatures of the states. These bodies were the legislative assemblies of single sovereign or partially sovereign states. The citizens owed but a single allegiance — allegiance to their respective states. In the words of political science, they were simple states, as contrasted with confederate or federal states. Not so with the United States. The Confederacy was a league; the new government, about to be established, was a federal state, composed not of one single sovereign political unit but of the states, each sovereign in all fields not delegated to the federal government. The legislative body must represent, therefore, not a single political unit but many units. The meaning of the terms "legislature," "parliament," and "assembly" had been restricted by custom to the meeting of representatives of single states. The use of the word "Congress," itself a diplomatic term, connoted the idea of a meeting of representatives or envoys from many states.

The true significance of the name "Congress," as designating an assembly of diplomats, is seen from the structure and working of both the Senate and House of Representatives. In the

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[1] All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. — The Constitution of the United States, Article I, Sect. i

Senators sometimes regard the interests of states as superior to interest of the country

Senate it is the more obvious. Even to-day senators sometimes speak of themselves as ambassadors of their state. The equal number assigned to every state, large or small, the method originally prescribed for their election, and the political influence of the individual senators all tend to emphasize this idea. Even party ties, strong as they are, may be broken with impunity when conflicting with the interests of the states. Thus the Democrats in 1913 were deprived of the votes of several Democratic senators, who felt that the provision for free sugar in the Underwood Tariff Bill would injure the industries of their states.

Representatives often judged by what they have gained for their districts rather than by services to the country

In the House of Representatives this characteristic is less obvious. Nevertheless, it exists to a very real extent. The qualification for membership, constitutional and customary, makes the representative, to a very real degree, a delegate from the district which chooses him. As will be seen, favors gained for the district — public buildings, improvements, pensions, claims, and offices — too often are the requisites for political preferment; nor will distinguished service to the nation as a whole often outweigh the local claims and demands for special consideration for the district.

Unfortunate results

Contrast with English Parliament

The result is unfortunate both from the point of view of the character of the members of Congress and the quality of the work they do. The successful "log roller" who obtains legislation pleasing to his constituency too often seeks and receives the support of the people. The time and energy of Congress is frittered away in meeting purely local demands, and too often wise and statesmanlike measures of national importance are saddled with restrictions and exemptions in favor of some influential locality. In England it is far otherwise. Legislation of a purely local character — "private bill legislation" — has a procedure which is semijudicial in form and entirely different from the great political measures. Members of Parliament, although chosen by local constituencies, hold themselves bound to represent the country at large, not solely their local constituencies, and have neither the opportunity nor the burden of satisfying the local desires for national favors. The ablest leaders of the party are sure of election from some constituency and are thus enabled to lead and direct the national legislation unhampered by local demands.

Congress a bicameral body

Congress consists of two bodies, a Senate and a House of Representatives. It has been said that the framers of the Constitution, in the attempt to give to the United States an improved English government, blindly copied this feature from the English system, but other examples were closer at hand. Most of the states had legislatures of two Houses, and the Constitution more nearly resembles an adaptation of the composite constitutions of the states than a slavish imitation of Great Britain. Furthermore both precedent and experience in America pointed to this form. All the colonies, save Pennsylvania, had been accustomed to a second chamber, smaller in numbers and more conservative in action than the lower chamber, and in spite of many frequent disagreements and much friction this part of the system had worked well and was so satisfactory that it was carried over into the constitutions of all but one of the states. The Congress of the Confederation alone was a single-chambered assembly, but the convention of 1787 was summoned to amend rather than to perpetuate the Confederation.

Bicameral legislature offered a basis of compromise between large and small states

Certain practical political considerations made the adoption of a bicameral legislature necessary. Equal representation of all the states had not worked satisfactorily in the old Congress. But the smaller states, jealous of their larger neighbors, refused to surrender entirely their privileges. The adoption of a two-chambered legislature presented the opportunity for a compromise. In the House of Representatives numbers were to have weight, and each state was represented roughly in accordance with its population. In the Senate each state alike was to have two representatives, and their equality in the federal union was thus recognized.

Political experience has justified composition of Congress

Political experience has quite generally justified the use of two-chambered legislatures. Certain very important advantages are gained by these means. Short terms and frequent elections in one body allow the immediate influence of popular opinion which is thought necessary for popular control. Longer terms and elections less frequent give the other chamber the opportunity to acquire experience, develop traditions, and learn to distinguish between the temporary ebullition of discontent and a genuine popular desire. A second chamber, in theory at least, is a check upon hasty and ill-considered legislation. A second chamber, moreover, gives an opportunity to apply different principles of representation. In Europe the second chambers of the legislatures are generally composed of representatives of the upper class, of wealth or official position, chosen in a different way and by a different process from the popularly elected chamber. In the United States the establishment of the Senate gave the opportunity to represent not merely population but sections of the country. As President Wilson has well pointed out, the Senate in representing the states is more truly representative, not necessarily of population but of the characteristics of the whole country. In the House members from fourteen large states possess an actual majority, while the sparsely settled communities, although receiving their proportionate number of representatives, are, for practical purposes, unrepresented. In the Senate every state, and every section of the country, is represented equally. Thus no one characteristic of the country is without its influence, and public opinion, which does not wholly depend upon mere numbers, is justly and equitably represented.[1]

President Wilson holds the Senate more representative than the House

Sessions of Congress

Although the Constitution [2] sets the first Monday in December as the normal time for the meeting of Congress, a resolution of the Congress of the Confederation fixed Wednesday, the fourth of March, as the date on which the new government should go into operation. At noon upon the fourth of March the terms of all elected officers begin and expire — while Congress itself does not normally assemble until the following December. Thus it happens that there are two regular sessions of each Congress: (1) the long session, which normally begins in December, but may be summoned any time after the previous fourth of March, and continues until adjourned, usually in the following summer; and (2) the short session which extends from the next December until the fourth of the March following. Congress, however, may by law appoint a different day of assembling, and during the difficulties with President Johnson, the beginning of the first session

The long session

The short session

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[1] See Woodrow Wilson, The Constitutional Government in the United States, chap. v.

[2] The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall, by law, appoint a different day.—The Constitution of the United States, Article I, Sect. iv, clause 2

of each Congress was fixed on March 4. This law was soon repealed. The president, moreover, may summon special sessions of either the Senate or Congress. Each incoming president ordinarily summons a special session of the Senate for the confirmation of his cabinet advisers; and may, if the party's legislative program is pressing, summon a special session of Congress. This has been done by both President Taft and President Wilson to put through the tariff measures of their respective parties. Moreover, since the second Congress of President Taft's administration was summoned to pass certain appropriation bills and President Wilson's legislative program required extra sessions, Congress has been in almost continuous session since 1909.

Congress in almost continuous session

Effect of the difference between the date of election and the opening of Congress

The difference between the date of meeting and the dates on which members of Congress are elected brings about a curiously unfortunate condition. Members of Congress are elected four months before they can possibly take their seats and thirteen months before the first regular session of Congress. The result is that the membership of even a new Congress reflects conditions which existed at least four months, normally a year, and actually for an even longer period before the session. Moreover, the last session of a Congress does not meet until its successor has been chosen. Thus the second session of the 65th Congress, elected in November, 1916, with a Democratic majority, met December 2, 1918, and continued to sit until March 4, 1919, although the elections for the 66th Congress, which took place in November, 1918, resulted in a Republican majority. A Congress elected three years previously may thus not merely reflect the opinion of that time but negative and prevent the immediate realization of public opinion as expressed at the time of its last session.

Constitutional qualifications for membership of the House

The constitutional qualifications for membership[1] in the House of Representatives are three: (1) age, (2) United States citizenship, (3) inhabitancy of the state from which he shall be chosen. To be an inhabitant of the state from which he shall be chosen is a more severe test than citizenship in the state. Citizenship and residence may depend upon declaration, while habitancy "is a physical fact which may be proved by eyewitnesses."[1]

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[1] No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. — The Constitution of the United States, Article I, Sect. ii, clause 2

Custom adds residence in district

To these constitutional requirements custom usually adds one more — residence in the district which the member represents. Remembering that Congress differs from other legislative assemblies in its quasi-ambassadorial character, the constitutional requirement of habitancy in a state seems reasonable. But there is less defense for the extra-constitutional and customary requirement of residence in the district. It may be argued that such residence enables a Congressman to represent better the opinion and desires of his constituents; and perhaps, when the districts were small, such might have been the case. At present, however, when the population of the districts is greater than the population of some states, the personal acquaintance of the representative must necessarily be limited. The system has another unfortunate aspect. Since every Congressman must be a resident of the district he represents, a defeated candidate cannot seek another constituency.. He must therefore satisfy the local organization and local appetite for governmental favors in order to retain his seat. Conversely, the House of Representatives may be deprived of a valuable leader because he fails to satisfy the electorate in some particular district. Thus Mr. Littlefield of Maine, chairman of the Committee on Judiciary, was barely elected in 1906 and decided not to be a candidate in 1908; and William McKinley through certain changes made in his district by his opponents was not returned to meet the attack upon the tariff which bore his name.

Unfortunate effect of customary requirement of residence in district

The House the sole and final judge of membership

The House is the judge of these qualifications and its decision is final.[2] Questions concerning disputed elections and qualifications are referred to one of the three standing committees upon elections of the House. The process is essentially a judicial one and sometimes it is conducted in a judicial manner, by hearing and examining witnesses and taking evidence under oath, but the final action is generally determined by political considerations.

Election contests

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. I, p. 525, quoting from Foster, Commentaries, Sect 62.

[2] Each House shall be the judge of the elections, returns, and qualifications of its own members. — The Constitution of the United States, Article I, Sect. v, clause 1

If the majority needs the contested seat the evidence will usually seem so conclusive to the committee, whose majority reflects the majority of the whole House, that its decision will be sustained with little hesitation.[1]

Expulsion

Even where the member has been allowed to take his seat and the oath, the majority, by a bare plurality, may hold that he has not complied with the qualification and declare the seat vacant. This process is quite different from expulsion, which requires a two-thirds vote, and may be applied for any offense the House deems worthy of such punishment.[2]

Disabilities of members of Congress: (1) May not hold a federal office

[Contrast with cabinet in parliamentary governments]

The first disability,[3] and that which most sharply distinguishes the congressional system in the United States from the parliamentary system in foreign countries, is that no officer of the United States shall be a member of Congress. In England and France the members of the cabinet generally must be members of the legislature, subject to its criticism and liable to removal at its pleasure. In 1787, however, the Philadelphia Convention with the remembrance of the "King's Friends" and the possibility of legislative corruption by appointments at the hands of the executive fresh in their minds, decided upon the opposite course. In so doing they were carrying to its logical consistent conclusion the theory of the separation of powers of the government in which they so firmly believed. But they secured freedom from the possibility of executive interference by the surrender of legislative control.

Even more stringent prohibitions were adopted. No member of Congress may be appointed to any office which has been

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[1] It is a familiar story that Thaddeus Stevens chanced one day to enter the House at the very moment when the roll was being called upon an election contest. As the call had nearly reached his name and he wished to inform himself instantly how to vote, he hailed the Republican nearest him with the question, "Which is *our* damned rascal?" That covered the whole issue — G. H. Haynes, The Election of Senators, p. 227

[2] Each House may . ., with the concurrence of two thirds, expel a member.— The Constitution of the United States, Article I, Sect. v, clause 2

[3] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.— The Constitution of the United States, Article I, Sect. vi, clause 2

(2) May not be appointed to an office created during his term

created during the time for which he was elected. It will be remembered that the courts have defined an office as ". . . a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties . . . [which] duties were continuing and permanent, not occasional or temporary." [1] Thus while seats in the House and Senate have often been vacated because of the acceptance of some executive, judicial, diplomatic, or military appointment, it has been the practice to allow a member to serve upon commissions, boards of trustees, and the like. It should be noted, moreover, that the disqualification does not apply to state offices. Nevertheless, Senator La Follette did not appear in the Senate until his term as governor of Wisconsin had expired, while Senator Johnson of California resigned from the governorship, although there was nothing in the federal Constitution to prevent them from occupying both offices simultaneously.

[This does not include service on commissions or state offices]

(3) May not be appointed to an office the salary of which has been increased during his term

The prohibition is still more comprehensive and forbids the appointment of any member of Congress to a position the emolument of which shall have been increased during the time for which he shall have been elected. In 1910 a technical violation of the spirit of this restriction occurred. Congress had voted to increase the salaries of the cabinet officers. Senator Knox, who was a member of the Senate at the time the vote was taken, was later appointed Secretary of State by President Taft. In order to avoid an open violation of this restriction, the salary of the Secretary of State was reduced to its former figure. This action was subject to criticism even by so stanch a Republican and supporter of the administration as Representative Mann of Illinois.[2]

[Case of Senator Knox]

Disability in the Fourteenth Amendment

At the close of the Civil War the Fourteenth Amendment added another disqualification to the effect that no person should be a representative or senator who had previously taken an oath as member of Congress, officer of the United States, or a member of a state legislature, or as an executive or judicial officer of any state to support the Constitution of the United States, and should "have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof."[1] Congress by a two-thirds vote of each House was allowed to remove this disability. This restriction, at first so sweeping as to disqualify all the Southern leaders, was soon modified by a series of amnesty acts, so that now it is believed that there is no person alive to whom it would apply.

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[1] *United States* v. *Hartwell*, 6 Wall 385, 393.

[2] Congressional Record, Vol XLIII, Part III, p. 2400, Feb 15, 1909.

The House may by refusing to seat a member add qualifications [Case of Mr. Roberts]

The question has sometimes risen whether either Congress or the states could add to these qualifications or restrictions. Legally, such is an impossibility. Yet, as has been seen, the political practice of the states has added residence in the congressional district to the list of requirements — a requirement showing the political policy rather than a qualification enforceable by Congress. But both Houses apparently with impunity may establish additional qualifications. In 1900 the House refused to seat Mr. Roberts of Utah, a polygamist, although it was argued that a more constitutional course would have been to accept his credentials, concerning which there was no dispute, and then expel him. This would have required a two-thirds vote, which, judging by the action of the House, could have been obtained easily. Nevertheless, the House by a large majority voted to exclude Mr. Roberts.

Salaries

Members of Congress receive salaries paid out of the United States Treasury. In the days of the Confederacy, when political service was regarded as a burden, and when the states paid the salaries of the members, delegations were frequently below the numbers assigned them. State governments refused to elect delegates or sought to economize upon their salaries. To make sure that the members of Congress would be independent of state grant it was decided that the federal government, not the states, should pay their compensation. This compensation, at first fixed at six dollars a day, was increased in 1817 to eight dollars, making probably an average salary of $1200 a year. In 1855 the salary was fixed at $3000, which was increased to $5000 in 1865. In 1873 occurred the "salary grab." Upon the last day of the session an act was passed increasing the salaries of most of the officers of the government, and the salaries of the members of Congress were increased to $7000, which was equivalent to voting a bonus to each representative. Private condemnation and public disapproval forced the repeal of this act, as far as the salaries of Congressmen were concerned; and they remained at \$5000 until 1907, when they were increased to \$7500.

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[1] The Constitution of the United States, Amendment XIV, Sect. iii.

Mileage

Clerk hire

"Franking privilege"

In addition to the salary, Congressmen receive traveling expenses fixed in 1865 at twenty cents a mile for a round trip each session. This is far in excess of the actual cost, and it has been estimated that it would pay the fares of a Congressman, his wife, and three children. In the days of free passes on the railroads this payment was clear gain; sometimes it has been attempted to vote payments when the sessions of Congress were separated by only a "constructive recess." In 1914 the House reduced these payments to a more reasonable basis, but the Senate refused to agree to the reduction, and the House, apparently very willingly, concurred without a roll call. Members of the House also receive \$1500 for clerk hire to be expended according to their discretion; frequently members of the representative's family act as secretaries and thus increase the family income. In addition to the individual clerks the more important committees are assigned clerks, stenographers, and messengers. These employees are carried upon the House roll and paid by the sergeant at arms, but the positions give some opportunity for political patronage. The members upon the important committees enjoy extra assistance. An allowance for stationery is given to each member. Most important, however, is the "franking privilege," by which members may send free through the mails matter stamped with their names. In campaign times this privilege is grossly abused. Political speeches are delivered in both Houses, or, under "leave to print," find their way into the Congressional Record and are widely distributed under the frank of some member. Thus the surplus of 1910 of the Post-Office Department became a deficit of over \$1,000,000 largely because of the "extraordinary amount of franked matter mailed in the political primaries." [1]

Freedom from arrest

Members of Congress receive the traditional privilege of freedom from arrest except for serious crimes.[2] This privilege, however, is of little importance, as the arrest of the person is now almost never authorized except for crimes which fall within the classes exempt from the privilege.[1] In addition, the members shall not be subject to action for what is said in any speech or debate. This privilege does not cover outside publication of such matter, but does include resolutions, reports, and "things generally done, in a session in relation to the business before it."[2]

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[1] American Year Book (1913), p. 559.

[2] . . . They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place. — The Constitution of the United States, Article I, Sect. vi, clause 1

Choice of speaker

The House has the privilege, common to most legislative assemblies, of choosing its presiding officer and other officials.[3] This presiding officer, known as the Speaker, in few respects resembles his English prototype. Like the Speaker of the House of Commons, he is charged with the preservation of order, and the enforcement of the rules of the House. He is, moreover, responsible for the management of the House, that is, the submission of business in the proper parliamentary order, the decision of points of order, and the counting of votes. But unlike the English Speaker, the Speaker of the House of Representatives is supposed to be a party leader rather than an impartial presiding officer. His tenure of office therefore depends upon the ability of his party to retain a majority in the House, and as long as the party majority is maintained, or when the party regains power after an interval in the minority, the same Speaker is usually reelected.[4]

Choice of other officers

The other officers chosen by the House are the sergeant at arms, who acts as the disbursing officer, the doorkeepers, the clerk upon whom falls the responsibility of calling each new Congress to order and making out a temporary roll, as well as of keeping the records of the House; the assistant clerks, the chaplain, and numerous subordinate clerks. It is a mistake, however, to assume that any of these officers are in any real sense elected by the House. The elected officers are chosen in a secret caucus of the majority and perforce confirmed by the House. The minority usually formally votes for some candidate for Speaker, who in recent years has been regarded as floor leader for the minority.

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[1] W. W. Willoughby, The Constitutional Law of the United States, p. 1530.

[2] See *Kilbourn* v. *Thompson*, 103 U. S. 168.

[3] The House of Representatives shall choose their Speaker and other officers; . . . . — The Constitution of the United States, Article I, Sect. ii, clause 5

[4] The following have been exceptions to the general rule: Bell, 1835; Hunter, 1841; Keifer, 1889, and Cannon, 1919.

Rules of procedure

Both the House and Senate have elaborate rules and regulations for their proceedings. Those of the Senate can be changed only by amendment, while every two years the incoming Congress adopts its own rules. It is customary, however, for each successive Congress to adopt the rules of its predecessors, with such slight changes as may seem advisable to the majority. Thus, in the House as in the Senate the rules change very slowly and there has accumulated a mass of precedents for procedure which not only determine the methods of legislation but for practical purposes define the powers of both Houses. Of course, however, by unanimous consent these rules can be dispensed with or by extraordinary majorities they may be suspended or amended, but ordinarily they serve to bind both bodies quite as much as any constitutional limitations.[1]

Quorum

For the transaction of business a quorum is necessary.[2] By the Constitution this is fixed at a majority. This is an unusually large number. In the House of Commons with seven hundred and seven members forty is a quorum, while some sorts of business may be transacted in the Lords with only three members present. In the House and in the Senate a number less than the majority may either adjourn or compel the attendance of absent members. The rules of the House require the presence of every member unless excused or necessarily prevented; and in the Senate, " No Senator shall absent himself from the service of the Senate without leave." [3] In the Senate a majority of those present may direct the sergeant at arms to request or, if necessary, to compel the attendance of the absent members; in the House it is necessary to have the attendance of fifteen members, including the Speaker, to compel attendance. Generally the attendance is surprisingly good, far better than at either of the Houses of the English Parliament. At times, while less than a quorum seem to be actually present upon the floor, they may be quickly summoned from committee rooms and office buildings.

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[1] See Chapter XIII.

[2] . . . A majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide. — The Constitution of the United States, Article I, Sect. v, clause 1

[3] Rule V, Sect. i.

Discipline

Both Houses have the power to punish their members for disorderly conduct.[1] In 1842 Joshua Giddings of Ohio was reprimanded by the House for introducing resolutions concerning slavery, while in 1863 Jesse D. Bright, senator from Indiana, was expelled for having expressed in a private letter, which was later published, sympathy for the rebellion.[2] Both Houses have unseated members for corrupt practices in connection with their elections — a process quite different from expulsion, in that it requires a bare majority vote.

Journals

Executive sessions of the Senate

Both Houses are required to keep journals of their proceedings.[3] The Constitution, while directing the publication of these journals, allows both Houses to exercise their discretion as to the suppression of such parts as in their judgment require secrecy. The complete proceedings of the House are now published daily in the Congressional Record; and all the proceedings of the Senate except when in "executive session." Formerly the House held secret sessions, the last being in 1811; while the Senate for two years after its organization met in secret and did not open its doors to the public until 1793, when the distinction between legislative and executive sessions was established. In an executive session, or meeting from which the public is excluded, the Senate is usually concerned with the consideration of either treaties or nominations by the president. The name "executive" is applied to these sessions because the Senate is acting not as a part of the legislative assembly but as a council for the executive, giving its consent to certain acts of the president. Although senators are in honor bound not to disclose the proceedings until the injunction of secrecy is removed, the newspapers are generally able to publish a fairly accurate account of what has taken place.

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[1] Each House may . . . punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member. — The Constitution of the United States, Article I, Sect. v, clause 2

[2] Hinsdale, American Government, p. 160.

[3] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal. — The Constitution of the United States, Article I, Sect. v, clause 3

Yeas and nays

Upon the demand of one fifth, the yeas and nays of any vote must be entered upon the journal. This privilege is used for two purposes: (1) As a dilatory measure to obstruct or delay legislation. In the early sessions this feature was of little importance, as the House was small and a roll call short. But in a House of over four hundred it takes nearly an hour to call and correct the roll, hence the demand for the yeas and nays becomes a very efficient weapon in the hands of the minority.[1] (2) The roll call is also used for the purpose of making a record. This record, made upon popular measures, may be used to win local support; or upon measures less popular it furnishes a basis for an attack. Thus upon one of the Democratic tariff bills Mr. Mann, the leader of the minority, forced a large number of roll calls in order to put the Democrats on record as opposed to amendments, nominally in the interest of labor, but actually vitiating the whole Democratic policy. The following extract will show an example of a record vote:

> MR. MURDOCH. Is the gentleman from Virginia in favor of a record vote upon this proposition?
>
> MR. GLASS. I have no objection whatever. . . . (After considerable debate upon the Emergency Currency Act, in the course of which Mr. Murdoch made a political speech attacking "the money power of Wall Street" and defending the country banks, he said:) "Mr. Speaker . . . I ask for the yeas and nays." (The vote showed 331 yeas and 6 nays, thus Mr. Murdoch and five colleagues had the satisfaction of setting forth to their constituents their record in opposition to that of the vast majority of the House.)[2]

Neither House may adjourn for more than three days without the consent of the other

Although the Senate may be summoned for a special session, neither House of Congress may adjourn for more than three days without the consent of the other.[3] With a bicameral legislature of coördinate houses the necessity of this provision in regard to adjournment is evident; yet sometimes it leads to curious results. For example, in 1909, while the House was considering the

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[1] For further treatment of obstruction see Chapter XIII.

[2] Congressional Record, August 3, 1914.

[3] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting. — The Constitution of the United States, Article I, Sect v, clause 4

Payne Tariff Bill the Senate met every three days and solemnly adjourned; and in like manner in 1913, after the House had passed the Underwood Tariff Bill and the Currency Bill, it marked time by meeting only to adjourn every third day.

Revenue bills and impeachment proceedings must originate in the House

The House has special privileges not shared by the Senate. That of originating revenue bills and of impeachment are traditional with the English House of Commons and the houses of representatives in the recently formed state legislatures. The other right, that of the election of the president, has already been discussed. The provision concerning the origination of revenue bills was the result of a compromise. The large states conceded the equality of representation in the Senate and at first persuaded the convention that the exclusive power of originating money bills should be vested in the House. In the process of the discussion the clause was thrown out, thereby endangering the whole compromise. Finally it was adopted in the present form of compromise.[1]

Actual procedure on revenue legislation

In practice this has proved of little importance. The Senate has maintained that neither an appropriation bill nor a bill to reduce the taxes was a bill for raising revenue; while the House has asserted that a bill to repeal a particular tax might necessitate the imposition of other taxes, and hence should be called a revenue bill. In actual practice all the annual appropriation bills and the great revenue bills are first introduced in the House. But the right of the Senate to propose amendments has been most liberally interpreted by both Houses. For example, in 1872 the Senate substituted for a House bill reducing the tax upon coffee a bill revising the whole tariff. This caused the adoption of a resolution declaring that the action of the Senate was contrary to the Constitution and that the Senate substitute should be laid upon the table.[2] In the course of the debate Representative Garfield made a speech which well defines the theoretica relations upon this limitation. In part he said:

> We must not construe our rights so as to destroy theirs, and w must take care that they do not so construe their rights as to destro

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[1] All bills for raising revenue shall originate in the House of Representatives but the Senate may propose or concur with amendments as on other bills.—The Constitution of the United States, Article I, Sect vii, clause 1

[2] P. S. Reinsch, Readings on American Federal Government, pp. 1, 299.

Garfield on the power of the Senate to amend revenue bills

ours. If their right to amendment is unlimited, then our right amounts to nothing whatever. It is the merest mockery to assert any right. What, then, is the reasonable limit to this right of amendment? It is clear to my mind that the Senate's power to amend is limited to the subject matter of the bill. That limit is natural, is definite, and can be clearly shown. . . . We may pass a bill to raise $1,000,000 from tea or coffee; the Senate may move so to amend it as to raise $100,000,000 from tea and coffee, if such a thing was possible; or they may so amend it as to make it but one dollar from tea and coffee; or they may reject the bill altogether.[1]

Recent examples

Again, in 1888–1889, a House measure to reduce taxation and simplify the revenue collection was transformed by the Senate into a general revision of customs duties and internal taxes. In 1909 while the Payne Bill was under consideration by the House, the Senate Committee on Finance was busy framing its own measure. On the receipt of the House measure, it was referred to the Committee on Finance, who reported their own bill as a substitute, which with amendments was adopted by the Senate. In conference an agreement was reached — the Payne-Aldrich Act. In 1913 the Underwood Tariff Bill returned from the Senate with six hundred and seventy-four amendments, of which four hundred and twenty-six were accepted without change by the House, ninety-six were compromised, and from the rest the Senate receded.[2]

Impeachment

Impeachment proceedings are divided between the House and the Senate. The formal right of impeachment rests solely with the House, while the power to try impeachments is given to the Senate.[3] Only civil officers of the government are subject to impeachment. This excludes, of course, military and naval officers and, by a decision in 1798 in the case of Senator Blount, senators and, by analogy, representatives as well.[1] The offenses for which an officer may be impeached are defined as treason, bribery, or other high crimes and misdemeanors.[2] Bribery needs no definition, and treason is defined by the Constitution,[3] but in practice high crimes and other misdemeanors have received a broad definition, and out of nine impeachments held, in only five cases were the charges based on official crimes.[4]

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[1] P S. Reinsch, Readings on American Federal Government, pp. 299, 300

[2] American Year Book (1913), p. 371.

[3] The Senate shall have the sole power to try all impeachments; when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law. — The Constitution of the United States, Article I, Sect. iii, clauses 6 and 7

Punishment for impeachment

The punishment upon conviction is confined to removal from office, but to this may be added the disqualification of never holding any office of profit, trust, or honor under the United States. In two of the three successful trials this disqualification has been applied. It has been noted that the president's pardon does not extend to cases of impeachment, and that should a criminal offense be the cause of impeachment further punishment might follow. To this sentence of the court of justice the presidential pardon might extend.

Procedure in impeachment proceedings

Impeachment proceedings are commenced in the House when some member moves as a question of the highest privilege the impeachment of some officer. This resolution is referred to a committee. If this committee reports, upon investigation, in favor of impeachment, and is sustained by the House, a special committee is appointed to solemnly impeach the officer before the Senate. Articles of impeachment are prepared, and managers are appointed by the House to conduct the trial on behalf of the House, when the Senate notifies the House that it is ready to proceed. In the case of the impeachment of the president, the Chief Justice of the Supreme Court presides rather than the vice president, who, being next in succession to the president, would benefit by his removal. The accused is allowed counsel and the trial is carried on by means of examination of witnesses and the hearing of testimony. Any senator may take part in the examination of a witness and questions of procedure are decided by a majority vote. Conviction results only from a two-thirds vote.

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[1] See D. Y Thomas, The Law of Impeachment in the United States, *American Political Science Review*, Vol. II, pp. 378–395; W. W. Willoughby, The Constitutional Law of the United States, chap. lvi.

[2] The Constitution of the United States, Article II, Sect iv.

[3] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. — The Constitution of the United States, Article III, Sect. iii

[4] In short, then, it may be said that impeachment will lie whenever a majority of the House of Representatives are for any reason led to hold that the incumbent of a civil office under the United States is morally unfit for and should no longer remain in his position of public trust. — W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1124

The number of impeachments

There have been nine impeachments, the last in 1912, and only three convictions: two district judges, and one judge of the ill-fated Commerce Court; one president and one Justice of the Supreme Court have also been impeached, but acquitted after trial.

Apportionment of representation

The original Constitution declared that direct taxes and representation should be apportioned among the states according to population determined "by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."[1]

The original compromise on representation and taxation

This section represents portions of three of the compromises made by the convention. It represents a victory for the large states in basing representation in one chamber on population. But this victory was not a complete one, and was subject to the compromising concession to the slave states, that three fifths of their slaves should be counted as persons in determining their representation, and that only three fifths of the slaves should be counted in the assessment of direct taxes. Without this section of compromises the Constitution must have failed of adoption.

Effect of the Thirteenth, Fourteenth, and Fifteenth Amendments was to base representation on population

As a result of the Civil War the Thirteenth Amendment, abolishing slavery, put an end to the class of "other persons"; and the Fourteenth Amendment declared that representation should be distributed according to population, excluding Indians not taxed, and affixed penalties for abridging representation for any reason but rebellion or other crime; while the Fifteenth Amendment specifically forbade the abridgment of the right to vote on account of race, color, or previous condition of servitude. Thus representation is specifically, and direct taxes were, until the Sixteenth Amendment, apportioned solely according to population determined by the decennial census.

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[1] The Constitution of the United States, Article I, Sect. ii, clause 3.

Number of representatives and method of determining the ratio

The original article provided that the number of representatives should not exceed one for every thirty thousand, but that each state should have at least one representative. This ratio has never been reached, and the present ratio, based upon the census for 1910, is one for every 211,877. This ratio has been reached by a steady decrease from that of one to 33,000 in 1789. Yet with the decrease in the ratio the size of the House, except from 1840 to 1860, has increased. It started with 65, the number fixed by the Constitution, and now has reached 435. The method of apportionment and of determining the ratio and fixing the size of the House is largely experimental and subject to many changes and alterations during the process. The result sought for is to satisfy each state, by not diminishing but by increasing, if possible, its representation; to provide for an increase of representatives from the growing states, to avoid increasing the House unduly, and to find a ratio which will leave unrepresented as small fractions as possible. After the ratio and the number of the House have been fixed and the representation from each state determined, it is not unusual for the House to vote to give to a state or states additional representation. The last apportionment act (1911), based upon the census of 1910, was successful in many of these respects. It increased the House by only 36, while it did not diminish the representation of any state. Four states, however, were given representatives solely because of the Constitutional requirement.[1]

Representatives must be chosen by districts determined by the state legislatures

The Constitution makes no provision concerning the distribution of the representatives apportioned to the different states. It is silent whether they shall be elected by districts or at large by all the electors of the state. In a later section[2] it is provided that this shall be determined by the state legislatures, leaving, however, to Congress the power to make such regulations as shall seem necessary. No regulation was made until 1842. In that year the apportionment act provided that every state entitled to more than one representative should, by the state legislature, be divided into as many districts composed of "contiguous territory" as there were representatives allowed to the state, and that each district should be entitled to elect one representative.[1] In 1871 it was enacted that these districts should contain as nearly as practical an equal number of inhabitants. Subsequent legislation has allowed states to retain their former districts and to elect any new representatives allotted to them at large, or, if the number of representatives has been decreased, to elect the whole number at large unless the state legislature may decide otherwise.

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[1] For a full discussion of apportionment see P. S. Reinsch, American Legislatures and Legislative Methods, pp. 196–213; Jesse Macy, "Apportionment," in Cyclopedia of American Government, Vol. I, p. 56, where is shown by means of tables the decreasing ratio of the successive apportionments.

[2] The Constitution of the United States, Article I, Sect. iv, clause 1.

Exceptions

Representation by districts diminishes force of party majorities and provides for minority representation

One reason for this interference on the part of Congress was to diminish the force of party majorities and to provide in some slight measure for minority representation. Representatives elected at large reflect the party majority throughout the state and ignore any minority, no matter how large. Representatives elected by districts make it possible for local majorities to receive some recognition. But while these local majorities have been recognized to some extent, other very serious examples of misrepresentation, both as regards party strength and party population, have resulted.

Example: Massachusetts in 1912

Vote for presidential electors

Thus, in Massachusetts in 1912, a year, it is true, when the Republican party was split by the Progressive party, the vote cast for president was as follows: Wilson, 173,000; Taft, 156,000; Roosevelt, 142,000; giving the Democratic candidate a clear plurality of 17,000 over his nearest rival, and thus giving the eighteen electoral votes of Massachusetts to the Democrats.

Vote for governor

For governor, likewise elected at large, a similar result was obtained, Foss receiving nearly 50,000 more than his nearest rival. A very different condition, however, was seen in the election of Congressmen. A total of about 468,000 votes was cast, of which 189,000 were for Democratic candidates, 180,000 for Republican candidates, 92,000 for Progressive candidates, and 10,000 for Socialist candidates. But these votes were counted by districts, with the result that the Republicans, casting only about 38 per cent of the vote, elected nine, or 56.25 per cent, of the Congressmen; while the Democrats, casting over 40 per

Vote for Congressmen

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[1] U. S. Stat. at Large, Vol. V, p. 491.

cent of the vote, elected seven, or 43.75 per cent, of the Congressmen; and the Progressives and Socialists, casting 19 per cent and 2.1 per cent respectively, obtained no representation. In other words, 216,000 votes, or 46 per cent, were represented by Congressmen, while 252,000, or 53 per cent, were unrepresented at Washington. If, however, all the Congressmen had been elected at large like the presidential electors and the governor, and if the voters had continued to vote as they did,— an assumption by no means likely to be true,—there would have been still larger numbers unrepresented. For example, the Democrats, casting 40 per cent, would have elected 100 per cent of the Congressmen. Or, in other words, 60 per cent of the votes would be unrepresented and cast in vain—a result even more startling than is obtained by the district system.

Various remedies such as proportional representation and cumulative voting have been tried, but the results so far obtained have not been so decisive as to cause the system to spread.

In Massachusetts the districts are of nearly equal population

The example of Massachusetts has been taken because the districts in the state are nearly equal in population (the smallest containing 206,000 and the largest 217,000 in 1912; 216,000 and 254,000 respectively in 1915), while the district boundaries are fairly determined and inclose territory which may justly be called "compact and contiguous." These conditions are not always so well observed in other states. For example, as regards population:

Not so in New York

> The fifteenth congressional district (Republican) in New York (1905) had 165,701 inhabitants, while the eighteenth (Democratic) had 450,000 inhabitants. These discrepancies are partly due to the necessity of recognizing units of local government such as counties, townships, and city blocks in laying out the district, but are more especially due to the desire of the majority party in each state legislature to secure as many of its members as possible in Congress.[1]

"Gerrymandering"

The legislatures, for party or personal advantage, have manipulated the district lines in most remarkable ways. "Gerrymandering"—the name used for this practice, although not the practice itself—originated in Massachusetts in 1811 and to a greater or less degree has been almost continuously used by all parties in most states. Extraordinary examples of "compact and contiguous" territory have resulted; for example, the "shoestring" district of Mississippi, which extended almost across the state from north to south, and the "saddlebag" district of Illinois, which was composed of two groups of counties on different sides of the state, so connected as to crowd as many Democratic votes as possible into one district.[1]

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[1] C. A. Beard, American Government and Politics, p. 235.

Result of gerrymandering in Ohio on representation in Congress

As far back as 1870 Representative Garfield, in a speech in Congress, pointed out that in 1862 Ohio, with a clear Republican majority of about twenty-five thousand, was represented in Congress by fourteen Democrats and five Republicans; while in the next Congress with no great political change in the popular vote, there were seventeen Republicans and two Democrats. Although in fact the Democrats have since 1862 had the popular majority on national questions only once, they have returned a majority of the Congressmen four times.

"Gerrymander" for personal reasons

But the "gerrymander" is sometimes invoked for purely personal reasons. The doctrine of W. T. Price of Wisconsin, that "apportionments are not made to keep men in Congress but to permit other men to get there,"[2] often expresses the truth. A shrewd and skillful politician may so influence the committee of the state legislature charged with the apportionment that a district in which he is favorably known may be created for him. And, conversely, a hostile party in the state legislature may so alter the boundary lines that Congress may be deprived of the services of a tried leader because of local jealousy.

Federal elections may be under control of Congress

The control of congressional elections is absolutely in the hands of Congress.[3] This power of control was, however, never invoked until 1842. Since then it has been invoked several times.[4]

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[1] Reinsch, American Legislatures and Legislative Methods, p. 202. See also J. R. Commons, Proportional Representation, chap. III, for maps and tables. The illustrations given above are taken from this source.

[2] Reinsch, American Legislatures and Legislative Methods, p. 201.

[3] The House of Representatives shall be composed of members chosen every second year by the people of the several States. — The Constitution of the United States, Article I, Sect. ii, clause 1

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. — Ibid. Article I, Sect. iv, clause 1

[4] See Chapter VII.

The Fifteenth Amendment and the Force Act

The adoption of the Fifteenth Amendment, and the policy planned by the North for the reconstruction after the Civil War, produced collisions of authority which revealed certain interesting problems and limitations. The second Enforcement Act placed the election of representatives, if not under federal control, at least under federal supervision, and gave federal judges the power to appoint supervisors and United States marshals and deputies to preserve order. This right of control was resisted upon the ground that, although Congress might make regulations and appoint officers to enforce them, it could not direct state officers in the execution of state laws. This contention, however, was not sustained by the Supreme Court in its opinion in the case of *Ex parte Siebold*, where it said:

Regulations of Congress supersede state laws

> It [Congress] may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the state, there results a necessary cooperation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the state, necessarily supersedes them. . . .
>
> The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are state laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power so to do. It is simply an exercise of the power to make additional regulations.[1]

Congress may prescribe punishment for violations of state election laws

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[1] 100 U.S. 371, 383, 388, 389.

The court's interpretation of the power of Congress under the Fifteenth Amendment

The court, however, has insisted upon a strict interpretation of the phrases of the Amendment. Thus in 1902, in *James* v. *Bowman*,[1] it held a federal act unconstitutional because it attempted to punish bribery at both federal and state elections. The court, summarizing and quoting previous decisions, made these four points: (1) Congress has complete control over federal elections; (2) the Fifteenth Amendment extended this power and control over both federal and state elections; (3) but the power derived from the Fifteenth Amendment must be exercised in the enforcement of the constitutional prohibition against discrimination on account of race, color, or previous condition of servitude, and does not grant to Congress general powers over state elections; (4) that the enforcement clause of the Fifteenth Amendment must be applied solely against state not individual action.

Recent federal legislation under the regulative power of Congress has been concerned with campaign contributions and expenses.[2]

Vacancies

Vacancies created by death or resignation or other causes may be filled by special election held by order of the governor of the state. In practice, however, it is optional with the governor whether such shall be ordered or whether the district go unrepresented. Resignations are not addressed to the president or to the Speaker of the House, but to the state governor. It is, however, customary to notify the Speaker, and frequently members send their resignation to him.

Qualifications for voters

The original constitutional qualifications for electors[3] reflect the requirements of the eighteenth century. At the time of the framing of the Constitution every state had some property qualification, which varied with the importance of the officers to be chosen. In general the lowest qualification was for the election of representatives to the lower or more numerous branch of the state legislatures; thus it was the intention of the convention to make the qualifications as wide as the states themselves allowed at their own elections. It is to be noted that these qualifications were determined and fixed not by federal but by state laws. Consequently there has always been great diversity among the states, the newer states generally allowing manhood suffrage, while the older and more conservative states were slow to remove property and other qualifications. In few states were negroes allowed to vote before the Civil War. The Fifteenth Amendment, however, limited the right of the states in this respect, by forbidding the denial of the right to vote on account of race, color, or previous condition of servitude; while the Fourteenth Amendment declared that persons born or naturalized in the United States should be citizens thereof and of the state in which they were residing.

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[1] 190 U.S. 127.

[2] See pp 136–137.

[3] . . the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature. — The Constitution of the United States, Article I, Sect. ii, clause 1; also Amendments XIV, XV

The Fifteenth Amendment circumvented

As has been shown,[1] the court has held that citizenship did not necessarily confer the right to vote, nor did the Fifteenth Amendment confer the suffrage, but it did invest the citizens of the United States with a new constitutional right which is within the protective power of Congress.[2] Nevertheless, it is a well-known fact that many if not all of the Southern states have prevented most of the negroes from voting. This is accomplished either by applying some educational test or property qualification to whites and blacks alike, or by exempting from these qualifications those whose ancestors had had the right to vote — the so-called "grandfather clause."

[The "grandfather clause"]

Until 1914 it seemed impossible for the negroes to get relief from the courts. This was largely because of the nature of the particular cases brought before the court and kind of relief sought for. In 1914, however, a case came under an amendment to the constitution of Oklahoma where the issue was squarely met. The constitution prescribed a literacy test which should be applied to all voters. In 1910 an amendment was adopted part of which read as follows:

> No person shall be registered as an elector of this state or be allowed to vote in any election held herein, unless he be able to read and write

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[1] Chapter IV.

[2] The right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. — *United States* v. *Reese*, 92 U.S. 214–215

The Oklahoma requirements

> any section of the Constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. . . .

In giving the opinion on the case of *Guinn* v. *United States*,[1] Chief Justice White held concerning the Fifteenth Amendment: (1) that it did not take away from the state governments the general power over the suffrage; (2) but that it did diminish the power of the state government to restrict the suffrage on account of race, color, or previous condition of servitude; (3) that while the Fifteenth Amendment did not give the right of suffrage, "its prohibition might measurably have that effect." Concerning the amendment to the Oklahoma constitution he said:

Chief Justice White's application of the Fifteenth Amendment in holding the Oklahoma clause unconstitutional

> It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any other ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right of suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of the opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

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[1] 238 U.S. 347, 364, 365.

General qualifications fixed by the states: (1) Age (2) Citizenship

[Woman suffrage]

[The proposed federal amendment]

(3) Educational test

Aside from the qualifications, extra-legally erected in the South, all the states have fixed the age limit at twenty-one; all but nine require United States citizenship. In Alabama, Arkansas, Indiana, Michigan, Missouri, Nebraska, South Dakota, Texas, and Wisconsin, a declaration of intention of becoming a citizen is sufficient, and the anomalous spectacle is presented of citizens of foreign states taking part in the election of state and federal officers. By the end of 1918 fifteen states had granted full suffrage to women,[1] while in many others they are allowed to vote at certain elections. In June, 1919, Congress submitted to the states for ratification an amendment which declared that the right to vote should not be abridged on account of sex. About a third of the states require an educational test of some kind. The question might arise, If the court should attempt to enforce some congressional legislation under the sanction of the Fourteenth and Fifteenth Amendments against those states which deny suffrage to negroes, would not the other states where citizens are denied the right to vote because of some financial or educational qualification be also liable to have the basis of their representation reduced "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age"? Commentators upon the Constitution do not so believe, for in the words of Cooley, quoted with approval by Professor Willoughby:

(4) Financial test

> To require the payment of a capitation tax is no denial of suffrage, it is demanding only the preliminary performance of public duty and may be classed, as may also presence at the polls, with registration, or the observance of any other preliminary to insure fairness and protect against fraud. Nor can it be said that to require ability to read is any denial of suffrage. To refuse to receive one's vote because he was born in some particular country rather than elsewhere, or because of his color, or because of any natural quality or peculiarity which it would be impossible for him to overcome, is plainly a denial of suffrage. But ability to read is within the power of any man, it is not difficult to attain it, and it is no hardship to require it. On the contrary the requirement only by indirection compels one to appropriate a personal benefit he

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[1] Wyoming, 1890; Colorado, 1893; Utah, 1896; Idaho, 1896; Washington, 1910; California, 1911; Arizona, Kansas, Oregon, 1912; Montana, 1914; Nevada, 1914; New York, 1917; Michigan, South Dakota, Oklahoma, 1918.

might otherwise neglect. It denies to no man the suffrage, but the privilege is freely tendered to all, subject only to a condition that is beneficial in its performance and light in its burden. If a property qualification, or payment of taxes upon property when one has none to be taxed, is made a condition of suffrage, there may be room for more question.[1]

The process of election has been fully treated in the chapter on "Party Organizations."[2]

THE SENATE[3]

Constitutional requirements for senators

The constitutional qualifications for a senator are slightly different from those for a representative. The age is increased to thirty years, the requirement of citizenship is increased from seven to nine years, and the provision as to inhabitancy in the state from which they are elected is required of senators and representatives alike. The extra-constitutional requirement of residence within the district, which is generally enforced upon representatives, has of course no application to senators, nevertheless tradition and political customs often demand that both senators should not come from the same region of the state; while the law of Maryland[4] formerly required that one senator should be a resident of the eastern shore and one of the western shore. This law, however, was not observed by the state legislature, nor would the Senate enforce it as a disqualification for a successful candidate. Taken as a whole, the qualifications for the Senate aimed to create a body composed of older and more experienced men, who at the adoption of the Constitution had been longer associated with the fortunes of the country. The political importance of the Senate and the fact that election to it is regarded as the crowning honor of a politician's career, quite as much as any formal requirements, have resulted in accomplishing this purpose. Ever since the Jacksonian era the Senate has contained statesmen or party leaders who, because of their age, experience, or ability, have made that body the more important branch of Congress.

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[1] The Constitutional Law of the United States, Vol. I, p. 535

[2] See Chapter VI.

[3] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen. — The Constitution of the United States, Article I, Sect. iii, clause 3

[4] P. S. Reinsch, American Legislatures and Legislative Methods, p. 15.

Disabilities

The same disabilities as to holding office, or the acceptance of an office the emoluments of which have been increased during the term for which they are elected, apply to both senators and representatives alike. And the disabilities created by the Fourteenth Amendment for participation in insurrection or rebellion were at one time enforced against senators as well as representatives. Like the House, the Senate is the judge of the elections, returns, and qualifications of its members. In the House, it has been shown that the decisions of contested election cases are too often regarded as political questions; but while partisan politics have not been absent in the Senate, the Senate has been far more consistent and has maintained, if not a judicial impartiality, at least a respect for legal procedure and precedent. As in the House, the question has been raised whether the Senate, in determining the qualifications of its members, could apply tests other than those prescribed by the Constitution. The answer to this question in the Senate has been directly opposite to that of the House. The leading case was that of Senator Smoot from Utah. As in the case of Representative Roberts in the House, charges were brought against Senator Smoot that he was a supporter of the Mormon Church, although he was not personally a polygamist. But unlike the House, which refused a seat to Mr. Roberts, the Senate accepted Mr. Smoot. Both Republicans and Democrats alike agreed that, although the Senate might not add to the qualifications prescribed by the Constitution, yet by a two-thirds vote a senator might be expelled. The resolution for expulsion was defeated by a nonpartisan vote of 27 to 43, and that for exclusion by a vote of 28 to 42.[1]

Case of Senator Smoot

Contested elections

But while displaying a measurable lack of partisanship in the decision of election contests, the Senate has not been free from political or party bias in its investigations of charges of bribery or corruption on the part of its members. There have been twelve such investigations on the part of committees. Only one senator — Senator Lorimer of Illinois — has been expelled, but two others have resigned during the investigations. The principles which the Senate adopted in 1879 make conviction difficult, for it must be proved by legal evidence (1) that the claimant was personally guilty of corrupt practices, or (2) that a sufficient number of votes were corruptly changed to affect the result, or (3) that corruption took place with his sanction. Thus, in 1912 Senator Stephenson of Wisconsin, who acknowledged in his sworn statement that he had spent over $107,000 in his primary campaign, was allowed to retain his seat on the ground that he neither was personally guilty of corruption nor had sanctioned it. In the same year, however, Senator Lorimer of Illinois was unseated on the ground that corrupt methods and practices were employed in his election. Although freely charged in the debate, the official resolution did not charge complicity on his part in the corrupt methods.[1]

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[1] Congressional Record, February 20, 1907, Vol. XLI, Part IV, p. 3429.

Terms of senators

The terms of senators are fixed for six years, and by the Constitution the original members of the Senate were divided into three classes whose terms should expire at the end of the second, fourth, and sixth years so that one third of the Senate should be elected every second year.[2] Care was taken that the two senators from a state were not placed in the same class. Senators from newly admitted states are assigned by lot to the long or short terms.

Effect of six-year term

The effect of this provision is far-reaching. In the first place, the individual senators, feeling themselves secure in their positions for at least six years, are less fearful of the immediate disapproval of popular opinion than are the representatives, whose terms are for but two years. During the six years of a senatorial term changes may take place; new local politicians may arise who may need conciliation quite as much as their predecessors and whose power to reward or punish is long delayed. The senator, unlike the representative, who under normal conditions has served more than one half of his term before he takes his seat, is not immediately concerned with his reëlection. Time and opportunity are given him to show his ability and, what is of almost equal importance, to strengthen his position with the local leaders.

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[1] American Year Book (1912), p. 46.

[2] The Constitution of the United States, Article I, Sect. iii, clauses 1, 2.

Senators, therefore, are judged by their record as legislators to a greater degree than representatives, the majority of whom scarcely have an opportunity to show their capacity.

The Senate a continuous body

The constitutional provision, moreover, makes the Senate a continuous body. Every two years a new House of Representatives is elected, a large part of whose members are serving their first terms. With the Senate, every second year only one third of the senators may change, while actually considerably less than that proportion are new members. In consequence the sense of continuity as an assembly has a marked effect upon the attitude of the Senate both in its internal organization and in its relation with the House and with the president. Continuity and long terms give opportunity to develop rules, precedents, and traditions, and, what is even more important, leaders, whose influence is based quite as much upon their ability and good judgment as upon the ephemeral success in debate or parliamentary tactics. In relation to the other branches of the government the six-year term and continuity of organization enable each senator to watch the changes in three congressional elections and one presidential election; while the rule which permits the election of only one third of the Senate every second year makes it possible for the Senate to be of a different political party from either the House or the president. The Senate is thus in a stronger position and has at times been able to thwart with impunity both of the other branches of the government.

Privileges of senators

Senators receive the same salaries and traveling expenses and have the same privileges of exemption from arrest and freedom of speech as do the members of the House. Their perquisites, however, are a little greater, for since practically every senator is chairman of some committee, furnished with at least a clerk, they obtain some extra clerical service. Their franking privileges and the privilege to print are the same; also the parliamentary privilege to demand a roll call and the entry of the names and votes of those present. The small size of the Senate renders this of less use as a means of delay than it is in the House; but it is sometimes resorted to in order to give a speaker engaged in a filibuster an opportunity to refresh himself. It is, however, often used to force senators to make a record which may be used for partisan purposes. The Senate has the same parliamentary duties and powers as the House with respect to maintaining a quorum, keeping order, disciplining its members, and publishing its journal. It has the special duty of trying impeachments brought by the House.

The vice president the presiding officer

The Senate, like the House, elects its inferior officials, — its secretary, sergeant at arms, and clerks, — but, unlike the House, its presiding officer is not one of its members. By the Constitution the vice president presides over the Senate except in the case of the impeachment of the president. Although as a presiding officer the vice president is supposed to be unpartisan, thus holding a different position from that of the Speaker of the House, his decisions have sometimes been known to be dictated by party policy.[1] Moreover, appeals from his decisions are frequent, and in the decision of these appeals the party in majority usually obtains its contention. In the absence of the vice president the Senate elects one of its members president pro tempore. In practice it is customary for the vice president to absent himself early in his term so that this officer may be chosen.

The Senate represents equality of the states

As the House of Representatives represents the states in proportion to population and size, the Senate represents the equality of the states composing the union.[2] As has been shown, apart from all precedents or examples, the bicameral organization of Congress was necessary in order to carry out the compromises between the large and small states. If numbers were the sole measure of the influence of a state in one chamber, another chamber must be created to recognize the equality of all the states; and small states were thus reassured by the apportionment of two senators to each state. Even more, to this provision the amending process cannot apply, for no state, without its consent, can be deprived of its equal suffrage in the Senate — a consent scarcely likely to be given.

The system of apportionment has always produced most striking inequalities in the representation of population. Even the

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[1] See the case of Vice President Sherman, below, p. 326; Congressional Record, March 4, 1911, p. 4285.

[2] The Senate of the United States shall be composed of two Senators from each State. — The Constitution of the United States, Article I, Sect. iii, clause 1

No State, without its consent, shall be deprived of its equal suffrage in the Senate. — Ibid. Article V, Sect. i

Criticism of equal representation in the Senate

first census of 1790 showed that if the senators were apportioned according to population at the ratio of two to Delaware's population of 29,548, Virginia with a population of 747,610 should receive fifty. These inequalities have increased with time and with the admission of new states and the massing of the population in cities in certain states. Thus, if New York had the same proportional representation in the Senate as Nevada was entitled to in 1910, she would be entitled to two hundred and twenty senators. Even more is involved than a lack of proportional representation. It is possible to select sixteen states, having together a population of about eight millions, or less than the population of New York. The thirty-two votes cast by the senators from these states would furnish the one third of the votes necessary to defeat some important treaty. In other words, the votes of the senators standing for eight millions could defeat the desires of the senators representing eighty-four millions. Or, again, states having about one fifth of the population choose half of the entire Senate, while more than four fifths of the population are represented by a probable minority of the Senate.[1]

Answer to criticism

In answer to this criticism it may be pointed out that in the first place it is largely theoretical and hardly practical; for never in the history of the country has there been a division between the states on the lines of large and small states. The small states have never acted in harmony, nor is it likely that they ever will. They are too widely separated, and their interests and political traditions are too diverse to permit such a union. It might be possible, however, for the senators from certain sections containing both large and small states to combine, but in such a combination the population would necessarily be represented to a more equitable degree than in the theoretical illustration.

Again, as President Wilson points out, the Senate represents something besides mere numbers. It represents the country in all its parts.

President Wilson on the Senate

> It is of the utmost importance that its parts as well as its people should be represented; and there can be no doubt in the mind of anyone who really sees the Senate of the United States as it is that it

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[1] P. S. Reinsch, Readings on American Federal Government, pp. 135–146, has similar statements made by ex-Governor McCall based upon the census of 1900.

represents the country as distinct from the accumulated populations of the country, much more freely and more truly than does the House of Representatives. . . . The House of Representatives tends more and more, with the concentration of population in certain regions, to represent particular interests and points of view, to be less catholic and more specialized in its view of national affairs. It represents chiefly the East and North. The Senate is its indispensable offset and speaks always in its makeup of the size, the variety, the heterogeneity, the range and breadth of the country, which no community or group of communities can adequately represent. It cannot be represented by one sample or by a few samples; it can be represented only by many, — as many as it has parts.[1]

General results of equality of representation in the Senate

From this point of view the equal apportionment of the senators is not only not unfortunate but a triumph of political sagacity. Certainly the career of the Senate has justified such praise. At times, particularly just before the Civil War, it seemed to oppose measures on purely sectional interests, at other times it has seemed to be the tool of economic or financial groups, but generally it has so directed its action that its policy has been more truly national than that of the House of Representatives, where numbers have full weight. Such action is bound to be in the nature of a compromise, and as such may not be fully acceptable to any particular section, yet because it represents the result of a national compromise in which all the regions of the country are equally represented, it truly reflects the national characteristics of the country.

Election of senators

In the convention of 1787 there was great diversity of opinion concerning the apportionment and method of choice of representatives, but only slight opposition to the method prescribed for the choice of senators.[2] Four plans were offered: (1) election by state legislatures, (2) election by the lower House of Congress, (3) appointment by the president, (4) election by the people.

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[1] The Constitutional Government in the United States, pp. 116, 117.

[2] The Senators shall be "chosen by the legislature [of each State]." — The Constitution of the United States, Article I, Sect. iii, clause 1

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators. — Ibid. Article I, Sect. iv, clause 1

These last two proposals received scant support, Gouverneur Morris being the only supporter of the appointment plan, and James Wilson voting alone for election by the people.[1] In fact, Wilson's scheme was entirely out of harmony with the temper of the convention. The demand was not how to get more popular control, democracy, — or, as it appeared to most of the convention, mob rule, — but how to prevent this. As Roger Sherman said, the endeavor was "that the people immediately should have as little to do as may be about the government." The plan for an election of the upper chamber by the lower was defeated by a vote of seven states to three,[2] and it was provided that the legislatures of the states should be charged with the function of electing the senators. The advantages hoped for were four: (1) it was asserted that such election would produce a higher grade of senators; (2) it would give more effective representation, and the senator elected by the whole legislature would feel himself less the representative of a class or factional interest than of the entire state; (3) such indirect election, it was hoped, would serve to check any evils which might arise from a House of Representatives elected directly by the people; (4) finally, the election of senators to the national government would bring that government and the state government into contact, and each would have an interest in supporting the other.

the election of senators

Although Congress was given power to make regulations concerning the time and manner of the elections of senators, — but not concerning the place, for that would involve determining the meeting-place of the state legislature, — no law was passed under this permission until 1866. By this act each House of the state legislature voted separately, and if the same candidate should receive the majority in both Houses, he should be declared elected; but if not, the Houses should meet in joint session at twelve o'clock each day and continue to ballot until some candidate should receive a majority of the votes. The operation of this law can hardly be said to have been satisfactory. Deadlocks, bribery, and corruption of the legislature, vacancies in the representation of the states, confusion of national and state business, and an interference with the legitimate business of the state legislatures have been some of the unfortunate results.[1] Although there have been some flagrant cases of misrepresentation and a few cases of notoriously bad senators, the system has produced a dignified, able, and efficient body, which has often been wiser and more farseeing than the House of Representatives.

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[1] G. H. Haynes, The Election of Senators, chap. i. Professor Haynes's book is the authority on this subject and from it is taken the material for this section.

[2] Massachusetts, South Carolina, and Virginia being in the minority.

Demand for popular election of senators

In 1826, forty years before the passage of the law regulating the election of senators, the agitation for the direct election of senators was begun. Not until the close of the Civil War did the agitation become marked, nor did it seriously affect Congress until 1893, but in the next nine years five resolutions passed the House in every Congress, except one, asking for a constitutional amendment providing for the direct election of senators. Outside of Congress the national parties were taking up the question, and in 1892 and 1896 it was favored by the People's party and in 1900 by the Democratic party; while in 1908, although not in the Republican platform, it received the indorsement of Mr. Taft.[2]

Evasion of the constitutional method of election of senators

Various states, however, refused to wait for such action and, by means of the direct primary, nominated candidates for the Senate whom it was expected the legislature would elect. This was only indicative of popular opinion within the party, and at best could only be morally binding upon the legislature. Oregon and Nebraska, however, went further and, after the primaries for the senatorial candidates, voted on these at the regular state elections, the successful candidate being known as the "People's Choice." Candidates for state legislatures were given an opportunity on the official ballot to indicate whether they would support the People's Choice, irrespective of party.[3] As a result, in 1908 the People's Choice, Mr. Chamberlain, a Democrat, was elected by a Republican legislature.

The Seventeenth Amendment

The presence of senators, elected in a semi-popular manner, together with the increased popular demand, finally forced the Senate to action, and in 1912 it adopted an amendment to the Constitution, which was submitted to the states and declared in force May 31, 1913. By this amendment senators are to be elected by the people of the states having the qualifications for electors of the most numerous branch of the state legislatures.

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[1] G. H. Haynes, The Election of Senators, chap. iii.

[2] Ibid. chap. v, gives an account of the movement for popular election.

[3] C. A. Beard, Readings in American Government and Politics (rev. ed.), p. 25, gives an extract from the law of Oregon (1904) concerning the method of election.

Effects of popular election of senators

The theoretical arguments for and against this plan of popular election are impartially presented by Professor Haynes, but it is yet too early to determine the practical working of the system. It will, without doubt, produce a marked change in the type of senators. Under the new system they must, in most states, be willing to engage in the preliminary contest of the direct primary for the party nomination, and later in the contest for election. Whether this will produce individual senators of a higher type or not is uncertain, but it is clear that they must be able to gain the popular support of the whole state electorate. They must be good campaigners even if they are deficient as statesmen. Whether this will produce a Senate of more radical tendencies cannot accurately be foreseen, for the length of terms may in a measure counterbalance the influence of popular election, but the Senate will doubtless be more responsive to public opinion as expressed at the polls. It is to be feared however, that popular direct election will have a tendency to reduce the number of reelections and thus deprive the Senate of the advantage of experienced leaders.

(1) on the Senate

(2) on state legislatures

The effect upon state legislatures cannot but be good. The members will be chosen on the basis of local state issues, rather than for the purpose of electing a senator.[1] The time of the legislature will be left free for state business, and no deadlock of one hundred and fourteen days, such as occurred in Delaware, will be possible.[2] Again the scandalous use of money to influence the votes of the legislature will cease, although some critics fear this corruption will be spread throughout the state electorate.

Vacancies

Vacancies are to be filled through new elections held upon the call of the state governors, but the legislature may direct the governor to make temporary appointments until the people fill the vacancy as the legislature shall direct.

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[1] In 1912 the Republican State Committee in Massachusetts unofficially conceded the impossibility of electing a Republican governor, but concentrated their efforts upon the attempt to secure a majority in both Houses of the General Court.

[2] G. H. Haynes, The Election of Senators, p. 38.

CHAPTER XII

CONGRESS AT WORK

ABSENCE OF EXECUTIVE LEADERSHIP IN CONGRESS

Executive leadership in England and Europe

In most countries leadership in legislative affairs is given to the executive. In those countries where the parliamentary system is established, the cabinet — heads of executive departments — is the directing force. In England and her self-governing dominions and in France the cabinet, indirectly chosen by the legislature, controls, as long as it retains office, the policy and procedure of the legislature. In Switzerland the executive is more independent of and consequently has less control over the legislature, but opportunities are given for the executive to explain proposed measures and to influence and facilitate their passage. The same was true in Germany under the imperial constitution.

Separation of powers in the United States prevents the establishment of the parliamentary system

In the United States the principle of separation of departments is carried to the extreme limit, and few opportunities are provided by the Constitution for executive leadership. The president, it is true, is directed to inform Congress concerning the state of the Union, and may recommend the passage of measures. He may, moreover, summon Congress in special sessions upon extraordinary occasions, but he has not the power of dissolving Congress and, by means of a special election, of appealing for popular approval of his measures. Unlike the chancellor of the former German Empire or the ministers of France and England, he has no seat on the floor of either House, no opportunity to take part in debate, and his public part in legislation is confined to the sending of printed messages or the reading of addresses, together with his constitutional right to veto.

The president, as chief executive, is not only limited in his legislative influence but the possibility of developing a cabinet

Limitations on executive leadership

system like that of France or England is precluded by the Constitution. "... no person holding any office under the United States shall be a member of either House during his continuance in office,"[1] — a provision based upon the English Act of Settlement still unrepealed, but interpreted in England to mean that every member of the cabinet must be a member of one of the Houses of Parliament.[2] Thus the president's cabinet is the direct antithesis of the foreign cabinets in that it is given no legislative power and few avenues of cooperation with Congress. It is true that the Secretary of the Treasury reports directly to Congress, and that the reports of the other officers are transmitted by the president to Congress, but these reports are referred to legislative committees, who may ignore the suggestions or propose measures quite different. The secretaries, like the president, have no seats in either House and, unlike the president, they cannot address Congress.

Actual influence of the president as leader

Nevertheless, it would be a serious error to assume that the executive is without influence. A resolute president, as party leader,[3] can usually control the majority of his party in Congress. Some of his power comes from his position and his appeal to popular imagination; much, however, of the compelling force behind his influence over Congress comes from the provisions of the Constitution which vest the appointing power and the power of veto in the hands of the president. It is true that the veto is seldom used, for affairs are adjusted and a compromise reached before such an open split between the president and his party is disclosed. The patronage, however, is a constant source of presidential influence which even some of the strongest upholders of civil-service reform have resorted to. Even in the use of patronage it may well be doubted whether specific bargains are very frequently made and votes actually bought by promises of appointments, although this is sometimes done.[4] Rather in unofficial ways, by interviews at the White House, letters and conferences, communications through a secretary, and, ially, — an innovation introduced by President Wilson, — rough interviews held in person at the president's room in e Capitol, the president's influence is exerted in such unistakable ways that few strong party leaders would dare resist. To sum up, it would be fair to say that executive fluence is exerted not in but outside Congress; that, as the esident and his cabinet are precluded from working openly the floor, they must resort to private, unofficial means to attain their ends. So powerful is their influence, however, not always with Congress but throughout the country, that their policies are usually adopted.[1]

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[1] The Constitution of the United States, Article I, Sect. vi, clause 2.

[2] One of the innovations introduced by the war has been the appointment of nonmembers as ministers.

[3] See pp. 168–174.

[4] See C. A. Beard, American Government and Politics, pp. 208–209, for use of patronage as a means of executive influence.

PARTY ORGANIZATIONS

Leadership in Congress to be found in organizations of parties in Congress

If there is no open executive leadership in Congress, legislative leadership must be exercised, for leadership there must be. This leadership is found in the organization of Congress into parties. Although the Constitution gives to Congress certain powers, it is not Congress or either House which actually performs these functions, but the party having the majority. Thus contested elections are referred to partisan committees and generally decided by partisan votes. The House nominally elects a Speaker, but actually merely ratifies the choice made by the majority members acting in secret. All legislation is prepared by committees on which the party in majority has the deciding voice, and is generally adopted by the party vote in each House.

The two-party system has resulted in the control by the majority

Political issues in the United States have favored the creation of the two-party system. While it is true that there have been third parties formed which polled large popular votes, they have seldom secured a large representation in Congress. Moreover, he majority party in Congress has generally obtained such a ecisive majority that it could afford to ignore the combinations f minority parties. Only four times in our history have minority arties held the balance of power, but in every case, except possibly in 1917, the House has been organized by and the Speaker chosen from the party having the plurality.[1]

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[1] President Wilson's smiling assumption in one of his addresses that he was cooperate with Congress greatly shocked many of the strong congressional aders.

How party organizations exert influence

The parties in Congress are the same as the national parties which nominate the candidates for president. In fact, at times members of the Senate have dominated at least one of the national organizations. The control of the national parties over the members is exercised through both the national and state organizations. The national committee of each party may devote some of its energy and some of its funds but more of its influence to bring about the election of senators and Congressmen in good favor with the party. The congressional committees work primarily to obtain as large a party representation as possible in each House, so that practically every member of both Houses is bound by ties of party loyalty, if not by actual obligation, to the organization of his party. The extent to which this obligation is created by aid and possibly by financial assistance is hard to measure. It is unlikely that open pressure is often exerted, for the organization would hardly aid a man whose party loyalty was open to question. But since the actual aid given by national party organizations is extended at most to only a small proportion of the members elected, appeals to party loyalty and opportunities for activity are more likely to be the means of maintaining the influence of the organization. More aid may be given to the members by their local state organizations and the obligation may be stronger there, but, as has been pointed out, the various state committees are all more or less under the control of the national committee, particularly in the year of a presidential campaign.

ORGANS OF PARTY ORGANIZATION AND LEADERSHIP

The legislative caucus

Since 1911 the chief organ of party control in Congress has been the legislative caucus. The use of a preliminary secret party meeting to determine the attitude of a party upon measures is not new. As early as 1794 the Federalist party utilized it, and in 1799 Jefferson, in a letter to Madison, described the action resulting from a caucus upon the Alien and Sedition bills as follows:

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[1] The 65th Congress, 1917, was an exception to this. In the House the Democrats and Republicans were almost equal and the balance of power was held by independent members. The 31st Congress had 112 Democrats, 109 Whigs, 9 Free Soilers; the 35th Congress, 118 Democrats, 11 Anti-Lecompton Democrats, 15 Americans, 92 Republicans; the 36th Congress, 92 Democrats, 7 Anti-Lecompton Democrats, 24 Americans, 114 Republicans; the 65th Congress, 215 Democrats, 211 Republicans, 5 Independents.

> Yesterday witnessed a scandalous scene in the H. of R. It was the day for taking up the report of their committee against the Alien and Sedition Laws, etc. They held a caucus and determined that not a word should be spoken on their side, in answer to anything which should be said on the other. Gallatin took up the Alien, and Nicholas the Sedition law; but after a little while of common silence, they began to enter into loud conversations, laugh, cough, etc., so that for the last hour of these gentlemen's speaking, they must have the lungs of a vendue master to have been heard. Livingston, however, attempted to speak. But after a few sentences the Speaker called him to order, and told him that what he was saying was not to the question. It was impossible to proceed.[1]

The modern legislative caucus

During the Civil War the caucus was at its height, but its influence declined until the special session of the 62d Congress in 1911, which had advocated limiting the power of the Speaker, revived its use. So successfully has it been operated and so pervasive has been its use that Representative Mann, the leader of the Republicans, exclaimed half in fun and half in desperation, "The Democratic caucus runs Congress."[2] Since 1848 the committees of the Senate have been chosen by the caucus, and since the Democratic control of the Senate in 1913 the caucus has been regularly used for legislative purposes.

Description and influence of the caucus

In the House of Representatives the members who have been reëlected assemble sometime before the close of the session to elect a caucus chairman and to choose candidates for Speaker and floor leader.[3] In the Democratic party the floor leader is also chairman of the Committee on Ways and Means, which nominates the members of the committees. Thus the caucus is organized, the candidates are picked, and the committee assignments are planned without consulting newly elected members.

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[1] H. A. McGill, on "Caucus," in Cyclopedia of Government, p. 232.

[2] Congressional Record, May 7, 1917, 65th Cong., 1st Sess., p. 200.

[3] The Republicans in February, 1919, held a caucus to which the newly elected members were invited, and to which nearly all of them came and participated.

A few days before the session the caucus is summoned, and the newly elected members are invited to take a part, although of necessity a perfunctory part, in the proceedings. The nominations and decisions of the caucus are held binding upon all the members of the party attending it. Refusal to attend and opposition to its decisions meet with the same discipline as is given to those who defy the decision of the caucus. Rule 7 of the Democratic caucus thus defines the caucus and its sanction:

> In deciding upon action in the House involving party policy or principle, a two-thirds vote of those present and voting at a caucus meeting shall bind all members of the caucus; provided, the said two-thirds vote is a majority of the full Democratic membership of the House, and provided further, that no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform from his nominating authority.[1]

Power of the caucus to control action

Since not many party questions before the caucus involve the construction of the Constitution, and since the local bodies nominating each Congressman keep fairly in touch with the principles and platform of the national party, the exceptions allowed by the rule amount to little. Nonattendance at caucus is equivalent to sacrificing not only the opportunity to influence its decisions and to share in the distribution of the committee assignments but other opportunities for distinction and advancement. Since the same discipline is meted out to a "bolter," little is to be accomplished by absence, but the threat of an influential leader to defy the decision of the caucus may accomplish a great deal. As a matter of fact influential members have little occasion to defy the decision of the caucus, for they control it. In the preliminary meeting the leaders of the present Congress control the organization of the caucus for the coming Congress. When the new members arrive they have their choice of taking their allotted places in the completed organization or defying it. Unless the party majority is very slender, it makes little difference to the leaders which course is adopted by the new member, but cooperation will ultimately be recognized and rewarded, while defiance will be ignored or punished.

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[1] W. H. Haines, "The Congressional Caucus of To-day," in the *American Political Science Review*, Vol. IX, p. 696.

More important, however, than the final vote upon a question is the preliminary discussion and framing of the measure. As will be seen, this is the work of the committees. Hence it is of vital importance that the organization of the party should control the committees. Since 1911 these are nominated by the caucus and elected by the House.[1] In actual practice the Democratic caucus has implicitly followed the lead of the Committee on Committees — that is, the Committee on Ways and Means. Thus the control of the party organization, and therefore the legislation of the House, is practically decided by the choice of the Committee on Ways and Means and largely by the choice of its chairman. He and his committee make the other committee assignments, which the caucus then approves and finally elects. Moreover, the caucus since 1911 has never failed to ratify the action of a standing committee.[2] When the standing committee is ready to report its action, the caucus listens, discusses the measure, and ends by passing a resolution similar to the following:

The Committee on Committees the power behind the caucus

> Be it resolved, by the Democratic caucus, that we endorse the bills presented by the Ways and Means committee . . . and pledge ourselves to support said bills in the House . . . with our votes, and to vote against all amendments, except formal committee amendments to said bills, and motions to recommit, changing their text from the language agreed upon in this caucus.[3]

Thus the vote of the House is but a ratification of the decision of the caucus, which in turn is generally the conclusion arrived at in committee.

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[1] In 1911 the Republicans vested the nomination of the committees in their floor leader, Mr. Mann, and the House ratified his choice. In 1917 this power was taken from the floor leader and vested in a Committee on Committees where it still remains.

[2] W. H. Haines, "The Congressional Caucus of To-day," in *American Political Science Review*, Vol. IX, p 696.

[3] *Caucus Journal*, April 11, 1911, quoted by W. H. Haines, in *American Political Science Review*, Vol. IX, p. 698.

THE CAUCUS AND COMMITTEE ON COMMITTEES IN THE SENATE

From 1896 to 1913 the Republicans controlled the Senate. Owing to their substantial agreement upon the tariff and money question, the party was well united, and the need for open forceful party organization was reduced to a minimum. At the beginning of each session of Congress the Republican members met in a brief caucus; elected a chairman of the caucus who was given the power to appoint the committees, and one of their number to act as president pro tempore during the absence of the vice president. The caucus then adjourned.[1] The position of chairman of the caucus, because of his power to nominate the committees, was of great importance, and since the chairman's nominations were not submitted to the caucus for ratification, the trend of legislation during the session was often determined by the action of that single senator, unchecked by any party discussion or formal vote. It is needless to say that this action did not represent the purely personal point of view of the chairman, but was guided by conferences with the influential senators of his party and limited by the custom of priority and continuous service upon committees. But the point to notice is that these conferences were not the result of open, formal party decisions, but were reached as the result of private personal agreements.

Influence of the chairman of the caucus: (1) under the Republicans

When the Democrats gained control of the Senate in 1913, this procedure was changed. Frequent and protracted caucuses were held, and legislation was framed almost as much in the caucus as in committees. Moreover, the Committee on Committees, instead of being the appointee of the chairman, was elected by the members of the party. Thus, as in the House,

(2) under the Democrats

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[1] Senator La Follette in 1898 thus described his experience with the caucus: "I attended a caucus at the beginning of this Congress. I happened to look at my watch when we went into that caucus. We were in session three minutes and a half. Do you know what happened? Well, I will tell you. A motion was made that somebody preside. Then a motion was made that whoever presided should appoint a committee on committees; and a motion was then made that we adjourn. (Laughter.) Nobody said anything but the senator who made the motion. Then and there the fate of all legislation of this session was decided." — P. S. Reinsch, Readings on American Federal Government, p. 168, quoting from Congressional Record, May 30, 1908

the emphasis is shifting from the more or less unseen influence of an unofficial leader to the formal action of the party through the caucus.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Contrast between the Speakers of the House of Commons and the House of Representatives

For nearly a century the Speaker of the House of Representatives has ranked next to the president in American political life. He was until 1911 the real leader in legislation and controller of the House of Representatives. To exercise these functions he has utilized both his party and personal influence. He has from the organization of the government occupied a position very different from the Speaker of the House of Commons. Nor was this difference the result of accident. The English Speaker is an impartial presiding officer, sinking his party and political feelings in the exercise of his judicial functions. He is the moderator rather than the leader of the House of Commons. The cabinet rather than the Speaker leads and controls the political action of the House of Commons. The English Speaker with great dignity and absolute impartiality enforces the rules of the House and sees that, while the minority has legitimate opportunities for debate and criticism, the will of the majority prevails without undue obstruction or delay. This conception of an impartial presiding officer was clearly established at the adoption of the Constitution, but no clause compels Congress to follow the English precedent.

Precedent for the American conception of the Speaker

The framers of the Constitution were, however, familiar with a different type of Speaker. The Speakers of the colonial assemblies were frequently the political leaders of their colonies and often in opposition to the provincial governors. The president of the Continental Congress was not merely a presiding officer but was charged with a few executive duties. The Speakers of the early assemblies in the newly formed states did not seek to occupy an impartial position but to direct the course of legislation. Thus, historically, there was ample American precedent for a political Speaker. Moreover, as has been pointed out, the absolute separation of the executive and legislative departments of the government precluded the development of the cabinet system with the leader responsible to the legislature.

Leadership must be exercised, and what was more natural than the development of the Speakership along traditional American lines? The Speaker thus soon became not merely the presiding officer but the leader of the House. With the development of parties he became a party leader. As the influence of these parties increased, his power grew. With the constantly increasing size of the House and the enormous expansion of business his power still further developed, so that he dominated the House, directed its procedure, and apparently determined legislation.

Source of the Speaker's power not wholly in his prerogatives

In the popular mind the control which the Speaker exercised was thought to come from his position as Speaker rather than his influence as leader. While it is perfectly true that the rules of the House did vest many important prerogatives in the Speaker's hands, yet even with these powers the House did refuse to follow a Speaker who was not a real and trusted leader, and did defy and thwart successfully the most masterful of Speakers, T. B. Reed.[1] Moreover, in the 62d Congress, 1911–1913, Oscar W. Underwood, as floor leader, without the prerogatives of a presiding officer, exercised as effective control as did Speaker Cannon, under whom the powers of the Speaker reached their highest development. Thus, in order to get a true conception of the American Speaker it will be necessary to examine with care not merely the powers given him by the rules, which apparently give him his prestige, but to bear in mind as well that these powers are exercised only at the will of the House and that the real influence of the Speaker comes quite as much from his position as one of the foremost leaders of his party as from his prerogatives as Speaker.

Choice of the Speaker

There are no instructions or directions in the Constitution concerning the choice of the Speaker. It is left entirely to the discretion of the House, and since the Constitution repeatedly emphasizes the separation of departments, no executive approval is required, as is still the formal custom in England. The House might thus decide to elect as its presiding officer one who was not a member, as it does actually do in the case of the clerk. Both English precedent and American practice were opposed to such a proceeding, and from the first the Speaker has always been a member of the House. Unlike the English method the Speaker is always chosen from the majority, and from 1799[1] he has always been strictly a party Speaker.

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[1] The resolution annexing the Sandwich Islands, which was an unprivileged one and had Speaker Reed's determined opposition, was forced through to its passage in spite of the Speaker's influence and all the parliamentary opposition which he and the Committee of Rules could devise.

Process of election of the Speaker

The formalities of the election are simple. After the clerk has called the temporary roll to determine whether a quorum is present, he announces that the next business is the election of a Speaker. Nominations are made, and the clerk appoints tellers and, upon their report, announces the election of the Speaker, who is escorted to the chair by a committee headed by the defeated candidate. Contrary to English practice, where election and reelection is the rule in spite of party changes, there is always a contest. The defeated candidate generally becomes floor leader of the minority, and in former times the Speaker's party rival became the floor leader of the majority.

Choice of Speaker determined in party caucus

Although the formal election is made in the House, the actual choice rests with the party in majority, and the selection is made in party caucus. In this meeting the claims of the rival candidates are settled, and the choice usually commands the full strength of the party vote. The advantages of this method of selection are obvious. Party disputes and personal claims are settled in private without the presence of a rival party ready to take advantage of disagreements and personal ambition. Should the dispute be transferred to the floor of the House, there would be opportunities for coalitions with the minority and even the possibility of the election from that party.

Reasons for choice of Speaker:

(1) Parliamentary knowledge

Various motives lead members to support a particular candidate. It might be supposed that knowledge of parliamentary procedure was indispensable, but although such is desirable the technical knowledge of parliamentary procedure is supplied by the Speaker's clerk, who is always an expert parliamentarian. Firmness, fairness, and a commanding presence are more necessary than technical knowledge. Upon certain occasions industrial and commercial interests which desired or feared governmental action have used their influence upon members to bring about

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[1] Theodore Sedgwick, of Massachusetts, Speaker, 1799–1801.

(2) Supposed promise of committee assignments

(3) Political principles

(4) Ability and leadership

the selection of a Speaker in sympathy with their aims. It is usually supposed that candidates obtain the support of certain prominent members by the promise of important committee assignments. To what extent this is common it is difficult to say; but in at least one instance it was openly admitted. Perhaps it would be fair to say that Speakers put their supporters on important committees, not as the reward of promised votes but to insure legislation they mutually desire. Thus Carlisle before appointing certain chairmen required the assurance that they would not report measures contrary to his views;[1] and there can be no doubt that Mr. Payne, as chairman of the Committee on Ways and Means, held views concerning protection in harmony with those of Speaker Cannon. But above all these more petty motives rises the political one. What are the Speaker's principles, and what does he propose to do? The successful candidate is generally some prominent member of the House who has a national reputation and stands for a certain type of legislation. Galusha Grow was elevated to the Speaker's chair for his activities in the abolition movement, as partially exemplified by his knocking down a Southern member in an encounter on the floor of the House.[2] Generally, however, the reputation of the candidates rests upon a more substantial foundation. Carlisle, for example, brilliant parliamentarian that he was, was elected because of his reputation as a tariff reformer; while Cannon, although considered a rather mediocre parliamentarian, was chosen on account of his personal popularity and his conservative principles. These examples emphasize the fact that the successful Speakers have generally been chosen because they were leaders in some field, not that they became leaders because they were chosen Speakers.[3] Genuine political ability, harmony with the political ideas of a large number of prominent members of the majority, personal popularity, and, above all, tact and skill in leading the majority to his point of view are the most important qualities considered in the choice of a Speaker, and form the basis of his power quite as much as the technical knowledge of procedure, helpful and important as this may be.

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[1] DeA. S. Alexander, History and the Procedure of the House of Representatives, pp. 69, 70.

[2] Ibid. p. 45, quoting Blaine, Twenty Years in Congress, Vol. I, p. 324.

[3] The converse of this statement is seen in the fate which overtook Keifer, who was in no sense a leader, and whose choice was an unfortunate accident.

The powers f the Speaker :

1) Mainte- ance of order

Primarily, the Speaker is elected to maintain order and to insure the proper conduct of business. In an assembly of over four hundred this is no easy task, yet the House of Representatives, while not as orderly as the English Commons, far exceeds the French Chamber of Deputies in this respect. In England the Speaker is regarded with such deference that usually upon a word from him the House becomes quiet, although he has been known to be compelled to leave the chair and suspend the sitting. In France the president of the Chamber of Deputies is armed with a bell which he rings violently, and when ordinary admonition fails he puts on his hat as a sign that the session is suspended. In the United States the Speaker has a mallet, the gavel, with which he pounds the desk in front of him to quiet disturbance, or in more serious cases he may direct the sergeant at arms to proceed with the mace, the symbol of the authority of the House, to the center of the disturbance. Once, in 1876, threats were made to call the Capitol police, but the threat was sufficient. The Speaker is authorized to suspend all business until order is obtained, and usually the words "The gentleman will suspend until the House is in order" are sufficient. Recalcitrant individuals may be named by the Speaker, a procedure which compels the House to act and acquit or punish the offender.

2) Points of rder

The most difficult task of the Speaker is to see that business proceeds in accord with the rules of the House and that members follow the rules. These rules, as will be seen, are of a highly technical nature and are probably fully understood by only a small fraction of the members. Debates and procedure are being constantly interrupted by claims of points of order which the Speaker must decide. Able parliamentarian as the Speaker may be, he is often forced to rely upon his clerk.

Decisions by he Speaker n points f order]

The Speaker may decide the question offhand, as one which falls obviously within a rule; or he may hear the arguments and opinions of some of the members. How many he shall listen to or how long the argument shall continue is entirely within his discretion. In the revolution which overthrew the Committee on

Rules in 1910, Speaker Cannon allowed the discussion to continue for a day and a night, most of which time he was not in the chair, while frantic attempts were being made to gather a safe majority to sustain his expected ruling. But whether the decision of the chair is made as the result of discussion or made upon the spur of the moment, this decision stands until overruled by the House. Any member may take an appeal from the ruling of the chair to the House. It is this right of appeal which caused Speakers like Reed and Cannon to assert that the Speaker had no arbitrary power, that he was but the servant of the House. Theoretically this is true. Practically, however, it is almost useless for a member of the minority to take an appeal to the majority, for generally they will support the decision of their own Speaker. Moreover, for a member of the majority to invoke unsuccessfully this right would be to invite retribution, while a successful appeal might precipitate a revolution as in 1910.

[Strength of precedent]

Most of the rulings are made according to precedent.[1] So strong is this power that Speakers have been known to rule contrary to their own personal opinion in order to keep the practice in harmony with the past. Some rulings, however, are made as the result of personal conviction; for example, the famous rulings of Speaker Reed. Others, upon political or party questions, may reflect not simply the Speaker's opinion but a policy adopted by the majority.

(3) Recognition

In legislative bodies no one may address the assembly unless recognized by the presiding officer. Disputed claims of recognition arise which are settled by various methods. In the House of Lords the House itself decides by vote which member it will listen to. In the American House of Representatives recognition has always been the prerogative of the Speaker. "When two or more members arise at once the Speaker shall name the member who shall speak."[2] From this rule adopted in 1789 Speakers went further and claimed that it gave them the authority to name the member entitled to the floor. From this was developed the custom of the Speaker's recognizing whomsoever he wished for political purposes, and of refusing to recognize those whose ideas did not meet with his approval. Although this power was used by other Speakers to insure the consideration of party measures, it reached its highest point in the Speakership of Carlisle, who gave or withheld recognition according as the members agreed with his personal opinions. Thus the Blair Education Bill, which had three times ✓ passed the Senate and was likely to obtain a favorable hearing in the House, was never considered, because Carlisle during his three terms consistently refused to recognize anyone to bring it up.[1] And in 1885 he prevented a revision of the internal revenue laws by refusing to recognize anyone to make such a motion.

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[1] A. Hinds, Precedents, in eight large volumes, will furnish material for the curious.

[2] Rule X, Sect. 2.

[Members are recognized for a particular purpose; hence members often consult the Speaker in advance]

Recognition even of the members of the Speaker's own party cannot be a chance affair, so the Speaker must know from previous interviews how the members stand on every question, and he generally fortifies himself with a list of those whom he has agreed to recognize. In case a member obtains the floor by some accident, the Speaker may withdraw his recognition in these words: "The gentleman is not recognized for that purpose. The gentleman from —— is recognized." Oftentimes members are quite astonished to find themselves recognized. Thus Speaker Reed prevented the consideration of a resolution in favor of the Cuban insurgents as follows:

> The gentleman from Maine moves the House do now adjourn. Do I hear a second? The motion is seconded. The question is now on the motion to adjourn. All in favor will say "aye." Those opposed "no." The "ayes" have it. The House stands adjourned.[2]

Mr. Dingley, the gentleman from Maine and the majority leader, was deep in tariff schedules and had not spoken a word; no one had seconded the motion, and hardly ten members had voted.

[Limitations on the Speaker's power of recognition]

Although the Speaker's prerogative of recognition is very important, there are many limitations upon it. The most important limitation lies in the order of business established by the rules of the House. Certain business, like reports from the Committee on Rules concerning the procedure of the House, is in order at any time, and the chairman must be recognized by the Speaker. Likewise about twenty committees have the privilege of reporting at any time. Moreover, the House has set apart certain days for the consideration of business of a particular character, as, for example, the business of the District of Columbia is always in order upon the second and fourth Mondays of each month. Thus, it is readily seen that, while for the minority the Speaker's power of recognition may seem arbitrary, it is so limited that the will of the majority, even against the desire of the Speaker, is bound to prevail.

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[1] M. P Follett, The Speaker of the House of Representatives, p. 262.

[2] H. B. Fuller, The Speakers of the House, p. 234. This anecdote is probably apocryphal, as no motion in the House ever requires a second.

(4) The appointment of committees was one of the Speaker's greatest prerogatives; limited by

Until January 18, 1790, the committees of the House were elected by ballot, but from that date until 1911 both the committees and their chairmen have been named by the Speaker. This has been regarded as one of his greatest prerogatives and, as will be seen, resulted both in keeping discipline and in determining the character of the legislation of the House. To the exercise of this prerogative are many limitations. The first and most obvious one is the limitation of party. In the early years of the government it was held that committees were impartial investigating bodies to be composed of the most able members irrespective of party. Although this idea soon disappeared, it was long customary to give important members of the minority chairmanships of committees.[1] Even this custom has disappeared, and the majority of each committee as well as the chairman closely follow the party changes of the House. Moreover, since the Speaker is elected by the dominant group within his party, this group receives the most important assignments. Next to party comes the question of political expediency. The party may be pledged to a particular policy, and the committees must be framed with that end in view. The Speaker, moreover, may have incurred obligations in securing his election which he must repay by committee appointments, although the extent to which this is done cannot be definitely known. Sectional claims were formerly much considered, and Pennsylvania and New England were supposed always to have representatives on the Committee

(*a*) the dominant group in his party

(*b*) party expediency

(*c*) obligations

(*d*) sectional claims

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[1] Thus Clay made Webster chairman of the Judiciary in 1823, and J. Q. Adams was chairman of some committee during most of his service. — M. P. Follett, The Speaker of the House of Representatives, p. 226

on Ways and Means and New York on the Committee on Commerce. Although these sectional claims are not now perhaps so much urged, charges of sectional favoritism are always made when the Democrats obtain control of the House, for the majority of their party is always from the South. Length of service generally brings promotion, and thus it generally happens that since Southern Democrats are more generally reelected than the Northern, they are made chairmen of the committees. Every Speaker must consider ability; consequently a Speaker may be forced to violate the claims of seniority, sectionalism, and even personal gratitude for the sake of obtaining a committee or chairman capable of leading the House to adopt the desired policy.

(e) length of service

(f) ability of members

The Speaker thus had it in his power to reward or punish a member

In spite of these limitations the power of appointment was still the strongest weapon in the Speaker's arsenal until 1911. A member was made or marred by the committee appointment he received. A member of the Committee on the Disposal of Useless Executive Papers, although he might share an office and have the appointment of a clerk, had little opportunity for attracting public attention or for accomplishing much for his constituents. In contrast the members of the Committees on Ways and Means, Appropriations, and Judiciary are frequently in the public eye, while a member of the Committee on Rivers and Harbors has opportunities to secure favors which strengthen his hold in his district and lengthen his political career. Nevertheless, the House, in spite of the possibilities of favoritism, continued the practice until 1911.[1]

Changes in 1911 lead to election of committees; actually to the selection by the caucus and ratification by the House

In 1910 and 1911 the change was made. Speaker Cannon, who had the longest continuous service of any Speaker, believed as other Speakers had that it was his function and duty to see that the House framed and adopted legislation of which he approved personally. To accomplish this he exerted to the utmost the powers already discussed and resolutely closed his ears to the demands of a slowly increasing number of Western Republicans whom he considered radicals and heretics. In the 61st Congress, 1909, the Republicans had a majority of about fifty, but of this number about thirty-five so chafed under Cannon's methods or smarted under his discipline that they were known as insurgents. On March 19, 1911, after three days of parliamentary wrangling and an all-night session, the insurgents and Democrats succeeded in passing a resolution that the Committee on Rules should no longer be appointed by the Speaker, but should consist of ten majority members and four minority members elected by the House, and that the Speaker should not be a member of this committee. When the Democrats obtained control of the House in the next Congress (63d, 1913) they so amended the rules that all committees should be elected by the House. In actual practice, from 1913 on, the caucuses of the respective parties have chosen the members of the Committee on Ways and Means, and each party delegation has picked the party members of the other committees. This selection is then submitted to the party caucus, and the results reported to the House and ratified.[1]

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[1] Attempts to amend the rule and elect the committees were made, but defeated in 1806 by a vote of 42 to 44; in 1807 by a vote of 24 to 87; in 1832 by a vote of 100 to 100, Speaker Stevenson voting to retain his privilege; in 1849 and in 1881 by a vote of 74 to 236 — De A. S Alexander, History and the Procedure of the House of Representatives, pp. 76–80

Effect of change to place the leadership in the hands of the floor leader

It is yet too early to determine whether this change will remain permanent, should the Republicans return to power, and it is also too early to generalize extensively upon its effect. Under the old system the leadership of the House was in the hands of one man — the Speaker. He was the leader because the House generally followed him and had delegated to him and concentrated in his hands sufficient power to make his leadership effective. Under the present system the Chairman of the Committee on Ways and Means, the chairman of the Committee on Rules, and the Speaker exercise portions of the Speaker's former great powers. The old Speakership is in commission. It is felt by some that danger lies in so distributing the powers and dividing the responsibility. "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?" But the most obvious result has been the fact that a real leader could lead the House without all of the Speaker's powers. This was demonstrated by Mr. Underwood in the 62d and 63d Congresses, when as chairman of the Committee on Ways and Means and thus floor leader of the majority, he exercised quite as much influence and authority as the strongest Speakers have ever done. Indeed, there was some complaint that there was little difference between Cannon in the chair and Underwood on the floor. Since his transfer to the Senate the Democrats have not been so fortunate in possessing a leader of similar marked ability and qualities; nevertheless, by constant use of the party caucus they have generally succeeded in holding their majority together so that they obtained the legislation they desired. In the 65th Congress, however, when the parties were practically divided and the floor leader of the Democrats not in harmony with the president, their success was not so marked. Should the change in the Speaker's position be permanent, it would seem that the person desiring active leadership will not seek the Speakership, but some other position. There is thus the possibility that the Speaker may in time become an impartial presiding officer shorn of any great political influence but always possessed of great dignity.

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[1] From 1913 to 1917 the Republican caucus vested the choice of the Republican members in James R. Mann of Chicago, the minority floor leader.

THE PRESIDING OFFICER OF THE SENATE

The function of the vice president as presiding officer of the Senate

By the Constitution the presiding officer of the Senate is the vice president of the United States. Unlike the Speaker of the House he is not a member of the Senate, and thus is in no sense a leader. On the contrary, he has no power of appointment and little power from his functions as a presiding officer. All that is required is dignity and sufficient ability to conduct the affairs of the very orderly Senate in accordance with the rules. He may decide questions of order, but appeals are frequent, and sometimes he prefers to submit the question to the Senate without attempting a ruling of his own. Nevertheless, in the 61st Congress Vice President Sherman came perilously near putting measures through by methods utilized by some of the Speakers of the House.[1]

The president pro tempore

The Senate at times chooses one of its members to act as president pro tempore, in the absence of the vice president. His position is quite different from that of the vice president. He loses none of his prerogatives as a senator, and at certain periods has been vested with the power of appointing committees. If not the actual leader of the Senate, he is one of the group which controls the action of the majority.

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[1] Congressional Record, March 4, 1911, p 4285.

FLOOR LEADERS

Original functions of floor leaders

Both the majority and minority parties are represented on the floor by official spokesmen known as floor leaders. The power of floor leaders has greatly increased since 1911 as that of the Speaker has declined, and their functions have undergone a most interesting evolution. Originally they were lieutenants of the Speaker, acting in cooperation with him or according to his directions. It was their duty to open and close debate, to make the necessary formal motions, to be ready for any emergency, and to avoid the pitfalls which the opposition was sure to prepare for them. Nominally they had control of all of the time for debate which usually is divided between the majority and the opposition parties. This control was exercised either by keeping control of the floor and yielding to certain members, or by preparing a list of members whom the Speaker recognized in turn. Thus they had it in their power to give a new member opportunity to be heard and gain notice and attract attention. But, since the time demanded for recognition exceeds the available time, it was necessary to make a careful selection from the members desiring to speak. Opportunity for the strongest speakers must be reserved, but a portion of the time must be assigned to members less able in order to promote party harmony and satisfaction. Before the Speaker was shorn of so much of his power, the position of floor leader of the minority was given to the defeated candidate for the Speakership, while that of the majority was assigned to the Speaker's nearest rival in the party caucus or divided among the chairmen of the important committees. The Chairman of the Committee on Ways and Means and the Chairman of the Committee on Rules obviously exercised the functions most frequently. But since, during the period of Republican control from 1896 to 1911, the caucus was used but sparingly, the Speaker really dominated the House and might utilize the chairman of any committee as floor leader.

The development of floor leaders

When the Democrats came to power in 1911 they were pledged to overthrow "Cannonism"; that is, the domination of the Speaker. The instruments they used were the caucus, the Committee on Rules, and the floor leader. They were most

Underwood fortunate in the choice of their floor leader, Oscar W. Underwood. He had been a member of the House since 1895 and had served on the Committee on Ways and Means from the position of last member for the minority until in 1911 he became chairman. He was thoroughly cognizant of the work of the committee and could speak with authority upon all phases of the tariff. Lacking perhaps the keenness of Williams and the oratory of Clark, the preceding leaders, he had solid common sense and great knowledge, and attained a personal popularity second only to that of Speaker Clark. He was a genuine leader. In the caucus held preliminary to the 62d Congress Clark was nominated Speaker, while Underwood was chosen chairman of the Committee on Ways and Means, charged with the framing of the tariff. In addition, the caucus voted to vest in the committee the nomination of other committees. His position was vastly different from that of previous floor leaders, and from those under the Republican régime, when the appointment of the committees was vested in the Speaker. He became thus the most powerful man in the House, able to control not only the action of the caucus but of the House as well.

Effect of change Since 1911, then, the power of the organization has not diminished; in fact, the pressure of the party organization is felt more, but it is the organization of the party in caucus rather than the personal organization of the Speaker. Moreover, this organization is directed from the floor, instead of being controlled by the Speaker utilizing his parliamentary powers as a presiding officer for party ends. The discipline of the Democrats seemed almost as good as that of the Republicans during their control of the House, and there is less dissatisfaction among the majority than there was under the old system.

The floor leader of the minority The functions of the floor leader of the minority are similar to those of the leader of the majority except that he is always unsuccessful. Towards his own party he occupies much the same position as the leader of the majority — he must lead, must be able to influence, persuade, and control. He initiates the policy of opposition, makes the formal motions in opposition to the party in power, opens the debate for the minority, and allots the time to the members of his own party. Before 1911 he served as one of the minority members of some committee, but since that time James R. Mann, the Republican leader, has taken no committee assignment, but has devoted all his time and attention to his work on the floor.

Development of leadership

While it would be too much to say that the floor leaders operate as those in the British House of Commons, yet the criticism made by Lord Bryce in 1888 that there were no responsible leaders in Congress is less true to-day. The floor leaders are not responsible in a parliamentary sense as are the cabinet ministers in Great Britain, yet party control has greatly strengthened them, and with it has come a development of their power and a fixing of responsibility upon them.

Floor leaders in the Senate

The parties in the Senate do not choose floor leaders. Personal influence combined sometimes with the chairmanship of a committee acting upon important measures gives to different members at different times a position somewhat analogous to that of the floor leaders in the House. Nevertheless, if not from actual choice, certain members are tacitly recognized and followed as the leaders of their respective parties.

THE COMMITTEE ON RULES

The nominal function and actual duties of this committee

As an instrument of party organization and leadership the Committee on Rules is most important. Before 1910 it was a small committee of five appointed by the Speaker who always designated himself as one member. Hence it was sometimes referred to as the Speaker and his two assistants — the minority members not being considered. The importance of the committee lies not so much in the fact that it nominally reports amendments to the rules and procedure of the House, as in the fact that at any time it may report a special rule. Moreover, since the chairman of the committee on making his report may at the same time move the "previous question," which limits debate to one hour, it gives to the committee a very real and actual control of the business of the House.

The power of the committee to control legislation

Legislation in the House under the ordinary rules is a very difficult and slow process, with many opportunities for possible amendments and delay. Hence much of the actual work of the House is done under unanimous consent or special rule. It is here that the power of the Committee on Rules is important and all-pervasive. As has been said, it may report at any time a special rule. This rule may determine the order of business; that is, it may interrupt the discussion of a measure and substitute another. It may do even more than that; it may limit the debate and fix the time for the final vote on the measure. It may decree that no amendments shall be offered and that the measure shall be voted on as reported, or it may designate certain sections which shall be open to certain amendments. Finally, it may substitute one measure for another, combine several measures, or prepare what is practically a new measure, on which the House must vote at a designated time. The committee, moreover, may conduct preliminary investigations preparatory to reporting a special rule to the House. It was before the Committee on Rules that the question of the "leak" of the president's message was investigated because of Mr. Lawson's sensational charges in 1916.

The Committee on Rules before 1911

As has been seen, it was the custom of the Republicans to vest this power in a small committee appointed by the Speaker, who was himself a member. This, with the Speaker's appointment of the other committees and his power of recognition, tended to make him all-powerful in the matter of legislation. In March, 1911, a combination of dissatisfied Republicans and Democrats altered this custom. The Committee on Rules is now elected by the House, and the Speaker is no longer a member. The number, moreover, is increased from five to ten, four from the minority and six from the majority; but the powers and functions of the committee are still the same, and thus it still has the power to direct the procedure and the form of legislation — in other words, it is still the steering committee of the House.

Changes in 1911

Effect of these changes

Since, however, the members are no longer appointed by the Speaker, their election depends upon the action of the Committee on Committees, and the majority of the caucus. Thus the party as a whole is, formally at least, consulted. Moreover, since the development of the powers of the floor leader, powers dependent largely upon his personal ascendancy and influence over the House, the Committee on Rules cannot afford to antagonize him. The net result of the changes since 1911, therefore, has been to divide the power of the Speaker into three parts: one, and that the smallest, is retained by the Speaker; a second, and perhaps the largest and most constantly used, is given to the floor leader; while a third, and that of final authority, is wielded by the Committee on Rules.

The Committee on Rules in the Senate

The Committee on Rules in the Senate has no such functions as has the House Committee. Special rules are unknown, and the rules committee of the Senate is charged with preparing amendments to the existing rules, which shall be of a permanent nature. The so-called steering committee of the Senate is an informal conference between influential leaders who agree among themselves what shall be done, but who have no such parliamentary status as the rules committee of the House.

CHAPTER XIII

CONGRESS AT WORK (CONTINUED)

THE ORGANIZATION OF CONGRESS

The Senate a continuous assembly

When Congress assembles either in extraordinary session or at the regularly appointed date, the Senate is a fully organized body, while the House is not. By the Constitution the terms of one third of the senators expire every two years, so that there is always a majority of the senators in office, a quorum, capable of doing business. The vice president, moreover, is the presiding officer, and holds his position independently of senatorial election; hence, except in very rare instances of disputed presidential elections, there is no question of organization before the Senate.

The House of Representatives must be organized at the opening of each Congress

It is quite otherwise with the House. At the end of each Congress the terms of all the members and officers expire. The present House cannot bind or prescribe the organization of the succeeding House. Only the Constitution or a statute can do that. As a result, on the assembling of Congress the House presents the curious spectacle of over four hundred members elect, having no legally recognized status and no organization. By precedent and rule, which has no legal force, the clerk of the preceding Congress prepares a temporary roll from the credentials of the members elect. In so doing he may leave off from the roll, because of contests or faulty credentials, a sufficient number to alter the party strength of the House. This was done in 1839 when the clerk, Hugh A. Garland, left off of the roll all the contestants from New Jersey, explaining that he had no authority to settle contests. By so doing he enabled his party to elect its candidate for Speaker and himself as clerk.[1]

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[1] De A S Alexander, History and Procedure of the House of Representatives, pp. 14–18

Process of organization

If the temporary roll call shows the presence of a quorum, the clerk announces that the next business is the election of a Speaker. The election of a Speaker by a party is generally taken as evidence that the successful party controls the organization of the House. Usually the other officers, the clerk, sergeant at arms, and the doorkeeper, postmaster, and chaplain, are chosen by the adoption of a resolution declaring that the candidates named therein are elected to the respective offices. But in the 65th Congress, when the parties were almost evenly balanced, the floor leader of the Republicans demanded a special vote upon the election of each officer except the chaplain, claiming that the Democrats did not have an actual majority.

Contested elections

After the Speaker is seated and has taken the oath, he administers it to the members elect. Whenever objection is made to any member's taking the oath, the Speaker refuses to administer it to that member without further action of the House. In the case of a contested election the case is referred to one of the Committees on Contested Elections, or if some other objection is offered, to a special committee.

THE RULES OF THE HOUSE OF REPRESENTATIVES

The rules are adopted at the opening of each Congress

So far the House has been proceeding under the rather plastic code of what is known as general parliamentary procedure. The next and very important step is the adoption of the rules. Speaker Reed, however, in the 51st Congress, 1889, postponed the adoption of the rules until the contested election cases had been decided and his own party had a safe majority. Ordinarily, however, the rules of the preceding Congress are adopted, and the House proceeds to further organization. The next step is the appointment of committees. Previous to 1911 these were named by the Speaker within a few days or at once, but in 1909 (61st Congress) Speaker Cannon named only the most necessary committees and delayed further appointments until the passage of the tariff bill. In so doing he put the members of the majority upon their good behavior, to be rewarded by good committee assignments or punished by unimportant ones. Since 1911 the committees have been elected by the adoption of resolutions from each party caucus presented usually by the respective floor leaders.

The rules are complicated, the principles simple, and the results make the House a body to register the decisions of its leaders

The rules and precedents of the House of Representatives are extremely complicated and technical and are understood fully by only a few expert parliamentarians. The principles and purposes underlying the rules, however, are exceedingly simple and direct. Briefly the rules make it possible that the majority shall have it in its power to write its will in legislation without undue delay by the minority. At the same time certain constitutional rights are preserved to the minority and certain opportunities for criticism allowed. Nevertheless, the development of the party system, the steady increase of the size of the House, and the enormous growth of business have brought about two things: more and more authority is exercised by the majority, and this authority is closely vested in a small body of leaders; and debate has been so limited and opposition so stifled that it has been said that the House has ceased to be a legislative body and has become a body for the registration of the decisions of the leaders.

The development of the rules insures the rule of the majority

Originally, when the membership of the House was small and mutual forbearance and courtesy prevailed between the members, procedure was simple and the rules were few. But this condition did not last long. The majority found it necessary to curb the undefined rights of the minority in order to make sure of the adoption of its policy. The whole history of the evolution of the present system of rules and the effect of their chief revisions in 1860, 1880, and 1889 has been to make sure that the minority could always and at once be made subject to the majority, and that the majority could always bring its desired measure to vote. This was finally accomplished by the Reed rules in 1889, and since that time there has been no successful instance of long delay or obstruction by the minority. The majority rules by the rules.

To accomplish this, three principles have been adopted. The majority is given power (1) to decide what business shall be considered, (2) to determine in what order it shall be considered, and (3) to prevent obstruction and delay.

(1) Consideration

The first protection which the majority has is the question of consideration. Rule XVI, Sect. 3, provides that "When any motion or proposition is made, the question, Will the House consider it? shall not be put unless demanded by a member."

Negatively this gives the opportunity to the House to determine whether it wishes to consider any question at any time. But the rules also exempt certain classes of questions concerning which the question of consideration may not be raised. These exceptions fall into two classes. The first relate to the order established by the majority. Thus the question of consideration may not be raised against a class of business that is in order under some special rule, or against a motion relating to the order of business, or upon a proposition before the House for reference merely. On the other hand, it may not be raised concerning a bill returned with the president's objections, nor upon a motion to discharge a committee. Thus the majority may determine at any time what business the House shall consider even to the extent of displacing the business established by the regular rules.

(2) Order of business

[The Calendars]

The normal order of business as prescribed by the rules is (1) prayer by the chaplain, (2) reading and approval of the journal, (3) correction of reference of public bills, (4) disposal of business on the Speaker's table, (5) unfinished business, (6) morning hour for the consideration of bills called up by committees, (7) motions to go into the Committee of the Whole House on the State of the Union, (8) orders of the day.[1] Furthermore, the business of the House is classified and assigned to certain calendars or lists or measures, namely: (1) the Union Calendar, on which are all public bills relating to the raising or spending of money; (2) the House Calendar, on which are all other public bills; (3) the Private Calendar, on which are all bills not of a public nature; (4) the Calendar for Unanimous Consent, on which may be put any measure which has been favorably reported and is on the House or Union Calendar (objection to consideration removes the bill from this calendar and restores it to its former place); (5) a calendar of motions to discharge committees from the consideration of certain bills.

[Certain classes of business assigned to certain days

Moreover, the House has assigned certain classes of business to certain days. The second and fourth Mondays of each month are set aside for consideration of the business of the District of Columbia, of which Congress is the local legislature. The first and third Mondays are suspension days, when it is in order to move that the rules be suspended, and a measure passed through all stages at one vote. On these days the Calendar for Unanimous Consent is called. It requires a two-thirds majority, however, to suspend the rules. On Wednesday of each week the House and Union Calendars are called, and each committee in turn may present its measure for consideration. Holy Wednesday, as it is called, is protected from the encroachment of the rules committee by the provision that it cannot be taken for any other purpose except by a two-thirds vote. Every Friday is set aside for consideration of private business on the Private Calendar. Thus on Tuesdays, Thursdays, and Saturdays the regular order established by the rules is followed.

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[1] Rule XXIV, Sect. 1.

[Priority given to certain classes of business]

[Privileged questions]

But the House has gone even further and has given priority to certain classes of business. These are known as privileged matters.[1] These questions have precedence over all matters except a question to adjourn. Privileged questions relate to the order of business, but certain matters of business arising under the Constitution which are mandatory in their nature have been held to have a privilege which supersedes the rules establishing the order of business; for example, bills providing for the census and apportionment, a bill returned with objections of the president, propositions for impeachment, resolutions for adjournment and recess of Congress. The ordinary rules and functions of the House under the Constitution are exercised in accordance with the rules without precedence as matters of privilege.[2] These privileged questions are reports, which may be presented at any time for certain specified committees on specified matters.[3] At any time after the reading of the journal it shall be in order, by the direction of the appropriate committees, to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the purpose of considering bills for raising revenue or general appropriation bills,[1] while the presentation of conference reports shall always be in order, except while the journal is being read or the roll called or the House dividing on any proposition.[2] So long has the list of privileged committees and questions become that the right would carry little weight if the right to report did not carry with it the right of consideration. While these privileged questions interrupt the established order of business, they may do so only with the assent of the majority.

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[1] A distinction is made between questions of privilege which relate (1) to the House in its entirety, its safety, dignity, and the integrity of its proceedings and (2) to the rights and reputations of the members in their representative capacity only.

[2] House Manual, p 656.

[3] The following committees and matters are privileged · (1) Rules, on rules, joint rules, and order of business, (2) Elections, on the right of a member to his seat; (3) Ways and Means, on raising revenue; the following committees having jurisdiction of appropriations when they report a general appropriation bill: (4) Appropriations, (5) Rivers and Harbors, (6) Agriculture, (7) Foreign Affairs, (8) Military Affairs, (9) Naval Affairs, (10) Post Office, (11) Indian Affairs, (12) Claims, (13) War Claims, (14) Accounts; (15) Public Lands, on bills for the forfeiture of land grants to railroads and other corporations, bills preventing speculation in public lands, and bills for the reservation of public lands;

[Conference reports]

(3) Obstruction

Just as it is the business of the majority to legislate, so it is the duty of the minority to force the majority to answer criticism and to perfect its legislation. Indeed, this is the purpose of debate and amendment. Inasmuch as the minority is generally opposed in theory and practice to the majority, it is rarely if ever convinced by the arguments presented. At a certain time the majority answers criticism and objections not by arguments but by votes. When should this time arise? Theoretically, perhaps, when every member has had an opportunity to express his opinions and to offer suggestions and amendments. If such were the custom, little would be accomplished even if only sincere arguments and amendments were offered. But actually the minority is not always sincere in its suggestions and argument. It is sincere in that it may believe that it is its patriotic duty to prevent the majority from legislating, but many of its objections and suggestions are means to an end, designed to obstruct and delay the final expression of the will of the majority. Obstruction, as this is called, generally takes the form of long speeches, frequent amendments, dilatory motions, and finally attempts to break the quorum without which the majority can do nothing.

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(16) Territories, for the admission of new states; (17) Enrolled bills; (18) Invalid pensions, for general pension bills; (19) Printing, on matters referred to it for the use of the House or the two Houses; (20) Accounts, on all matters of expenditure of the contingent fund. — House Manual, Rule XI, Sect. 56

[1] Rule XVI, Sect. 9.

[2] Rule XXVIII, Sect. 1.

To meet these the rules provide that debate shall be limited, that the previous question may be ordered, that the Speaker shall not entertain dilatory motions, and that he may count the physical presence of the members instead of depending upon the roll call to disclose a quorum. Each of these methods has been adopted as the result of a struggle, and each has had far-reaching effects.

Limitation of debate

Debate in the House is limited to one hour for each person who obtains the floor. This provision was adopted in 1841 to prevent the waste of time through unending speeches. It was not uncommon for members to speak for four or five hours, and Clay asserted that one member spoke for twenty-four hours without stopping.[1] When the House goes into the Committee of the Whole, debate is limited to five minutes for each amendment proposed, or upon a motion debate may be closed upon any section or series of sections.

The previous question

Although the rule in regard to the previous question was adopted in 1789, it was not used to limit debate until 1841, and in its present form and operation it is the result of a series of rules and interpretations. To-day any member may move the previous question, which, upon being adopted by a majority of the members voting, a quorum being present, has the effect of cutting off all debate and bringing the House to a direct vote upon the immediate question on which it was asked.[2] In order to prevent the complete stifling of debate and to give some slight opportunity for discussion, the rules provide that when the previous question is ordered there shall be allowed forty minutes for debate, provided no debate has taken place. Moreover, after the previous question is ordered, the Speaker may entertain one motion to commit to a standing committee, with or without instructions, the matter upon which the previous question has been ordered.

Effect of the previous question

The effect of the previous question is more than to cut off all debate. It stops that, it is true, and forces the House to vote upon the question. But it goes further and cuts off the possibility of amendment. When once ordered, the measure as it stands with the pending amendments, but without further change, must be voted upon. It therefore behooves the majority to be very certain that the matter shall be in such form as will be acceptable to them.

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[1] Annals of Congress, p. 699, 14th Cong., 1st Sess.

[2] Rule XVII, Sect. 1.

Dilatory motions

Motions are often made for the express purpose of consuming time and causing delay. A motion to adjourn, to take a recess, to postpone to a certain time, if entertained by the Speaker, must be put to vote. If ordered by a fifth of a quorum, tellers ave to be appointed, and if demanded by one fifth of those present, a yea-and-nay vote has to be taken and entered in the ournal. As it takes more than forty minutes to call the roll of he House and correct the vote, and as every motion, no matter ow dilatory, is subject to an amendment upon which the yeas nd nays may be ordered, the process is endless. At one stage of the 50th Congress the House remained in session eight days and nights and over one hundred roll calls were taken. This continued until 1890, when Speaker Reed, in one of his historic rulings, refused to entertain a dilatory motion.

Yea and nay votes

On January 31 the Democrats, bent on delay, were using every possible means to postpone the approval of the journal. At last, the previous question having been ordered, the Speaker put the question on the approval of the journal, whereupon for the fourth time a motion to adjourn was made. The Speaker continued to count the vote, and this colloquy took place:

MR. SPRINGER (while the Speaker proceeded with the count of those rising). Mr. Speaker, do you decline to entertain the motion to adjourn?

THE SPEAKER. A sufficient number have risen. The yeas and nays are ordered. The clerk will call the roll.

MR. SPRINGER (after the roll call had begun). Well, this is tyranny, simple and undiluted.

MR. BLAND (speaking amid great confusion and cries of "Order!"). This is an outrage. The House could not be in a more demoralized condition than the Speaker of this House.

The ruling of Speaker Reed on dilatory motions

[The Speaker then announced the result of the vote, and after the House had listened to a violent attack upon the Speaker, Mr. Springer again moved to adjourn. The Speaker ruled the motion out of order and refused to entertain an appeal from his decision. He sustained this epoch-making ruling as follows:] "There is no possible way by which the orderly methods of parliamentary procedure can be used to stop legislation. The object of a parliamentary body is action, and not stoppage of action. Hence, if any member or set of members undertakes to oppose the orderly progress of business, even by the use of the ordinarily recognized parliamentary motions, it is the right of the majority to refuse to have those motions entertained, and to cause public business to proceed. . . . Whenever it becomes apparent that the ordinary and proper parliamentary motions are being used solely for the purpose of delay and obstruction, . . . it is then the duty of the occupant of the Speaker's chair to take, under parliamentary law, the proper course with regard to such matters. . . ."

From this decision Mr. Springer appealed, but the House sustained the Speaker by laying the appeal upon the table.[1] Subsequently after the contested election cases were disposed of, the Committee on Rules brought a rule which read, "No dilatory motion shall be entertained by the Speaker."[2]

Practice of Speaker in enforcing the rule

In enforcing this rule Speakers have held that the object of the dilatory motion must be apparent to the House, and thus, usually, although by no means always, they wait until a point of order has been made from the floor that the motion is dilatory. This rule has been applied to motions to adjourn, to reconsider, to the question of consideration, to a point of order or of no quorum, and to the demand for tellers, but the constitutional right of the members to demand the yeas and nays cannot be overruled.

Counting a quorum

Since the Constitution requires the presence of a majority of the members of each House in order to do business, one of the commonest methods of obstruction was to break a quorum. This might be done by members physically absenting themselves. But since each House could compel the attendance of its members, a simpler and more efficacious method was discovered. From the organization of the government the presence of a quorum was determined by a roll call, and it was held that, unless a yea-and-nay vote disclosed a majority voting, a quorum was not present. Thus members might answer to their names upon a roll call, but refuse to vote upon the call for yeas and nays, thereby forcing the majority to move another call of the House to which they would answer, only to sit silent again. Therefore, unless the majority had always present a majority of the House, it was in the power of the minority to block or defeat all action.

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[1] Congressional Record, January 31, 1890, pp. 998–1001.

[2] Rule XVI, Sect. 10

Attempts to alter practice

In 1875 it was urged that the Speaker record as present those who were announced as present by another member rising and announcing the presence of a member and asking that his name be recorded. But Speaker Blaine declined to do this. In 1890, however, Speaker Reed solved the difficulty. Upon a question of the consideration of a contested election case the vote stood ayes, 161; nays, 2; not voting, 163. A quorum, therefore, was not disclosed by the vote, and Mr. Crisp made the point of order that no quorum was present. The Speaker directed the clerk to record as present but not voting the names of certain members he saw present, thereby establishing the record of a quorum.[1] He sustained his ruling by a lengthy opinion, holding that it was the presence of the members, not their performing certain functions, which established a quorum, and in it he said:

The ruling of Speaker Reed on counting a quorum

> It is a question that is a determination of the actual presence of a quorum, and the determination of that is intrusted to the presiding officer in almost all instances. Again, . . . there is a provision in the Constitution which declares that the House may establish rules for compelling the attendance of members. If members can be present and refuse to exercise their function, to wit, not be counted as a quorum, that provision would seem to be nugatory. Inasmuch as the Constitution only provides for their attendance, that attendance is enough. If more were needed, the Constitution would have provided more.[2]

Present practice

At the next session of Congress the Democrats, who obtained a majority, reversed Mr. Reed's ruling. Thereupon Mr. Reed and the Republicans under him refrained from voting until, after weeks of helplessness, the Democrats were forced to adopt a modification, by which tellers, instead of the Speaker, counted the members present but not voting. This ruling combined with the rule which forbade the Speaker to entertain dilatory motions effectually muzzled most of the obstructive tactics of the minority.

Yea and nay votes in 1908

One further method of obstruction lies in the constitutional prerogative which allows one fifth of those present to demand the yeas and nays upon every question. This was the method of filibustering inaugurated by John Sharp Williams in 1908. His avowed purpose was not to prevent legislation but to compel the Republicans to pass certain measures.[1] To attract the attention of the country by the delay he caused in legislation, Williams announced that he would refuse all requests for unanimous consent, and that he would demand roll calls on every possible occasion. To meet this the Republican Committee on Rules brought in the following rule, which well illustrates the power of that committee:

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[1] Congressional Record, January 29, 1890, p. 949.

[2] Ibid p. 950

Met by a temporary resolution of the Committee on Rules

> *Resolved*, That upon the adoption of this rule, and at any time thereafter during the remainder of this session, it shall be in order to take from the Speaker's table any general appropriation bill returned with Senate amendments, and such amendments having been read, the question shall be at once taken without debate or intervening motion of the following question: "Will the House disagree to said amendments *en bloc* and ask a conference with the Senate?" And if this motion shall be decided in the affirmative, the Speaker shall at once appoint the conferees, without the intervention of any motion. If the House shall decide said motion in the negative, the effect of said vote shall be to agree to the said amendments.
>
> And further, for the remainder of this session, the motion to take a recess shall be a privileged motion, taking precedence of the motion to adjourn, and shall be decided without debate or amendment.
>
> And further, during the remainder of this session, it shall be in order to close debate by motion in the House before going into Committee of the Whole, which motion shall not be subject to either amendment or debate.[2]

This greatly reduced the number of roll calls but by no means eliminated them. It not only effectually muzzled the minority but compelled the majority blindly to follow the direction of the leaders. The episode is instructive, however, in showing how the size of the House and the possibility of obstruction force the House to become less and less a body for consideration and more and more a body to register the wishes of the leaders it follows.

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[1] These measures were progressive or radical in their nature and quite unacceptable to the leaders of the House, although desired by a number of Republicans. They included employers' liability bill, publicity for campaign contributions, free wood pulp for printing paper, a bill preventing *ex parte* injunctions.

[2] Congressional Record, April 4, 1908, p. 4368.

THE RULES OF THE SENATE

Rules of the Senate permanent

The Senate being a continuous body does not adopt its rules with each Congress. The rules and standing orders are continued from one session to another with little or no change and with but few amendments. In general, with certain technical differences of interest chiefly to senators or to students of parliamentary procedure, the rules provide for the transaction of business in a method somewhat similar to that followed by the House. In two important particulars there are vast differences. In the first place there is no privileged business in the Senate. Thus to proceed with a measure to the exclusion of others upon the calendar, it requires unanimous consent or a motion carried by the majority. The second difference, and this is of vital importance, is that until 1917 the Senate had no method of dealing with obstruction. There is no limit to the length of time a senator may occupy, and no use of the previous question as it is employed in the House. Hence it is possible for a minority to thwart the desire of the majority, and by continuous talking to prevent the passage of any measure. Thus, shortly after the Civil War a minority succeeded in defeating the passage of the Force Bill, and in 1917 the six "willful men" prevented the passage of the bill to allow the arming of merchantmen — a measure President Wilson strongly desired.

Unanimous consent

No adequate method of dealing with obstructions

As a result of these rules, or rather the absence of rules, much of the business of the Senate is transacted under unanimous consent agreements, and by mutual forbearance of objections. Since every senator will be forced at times to ask favors, he is careful not to deny them to others, and much of the legislation goes through without open criticism and objection. With great party measures it is different. Here the party by sheer force of votes may obtain the consideration of a measure; but once under consideration no senator or group of senators can check the debate. Time and fatigue alone will do that. Generally, however, unless an avowed "filibuster" is under way, the minority, after delay sufficient to call the attention of their constituents and of the country at large to the measure, will agree to fix some date at which the vote may be taken. The preparation and

"Filibuster"

wording of this agreement are matters of long consultation and discussion, but once made are scrupulously observed. If, however, the session is drawing to a close and the minority sees personal or party advantage in defeating the measure, requests for agreements are refused and a contest of physical endurance ensues.[1]

Present method of dealing with obstruction

After the exhibition in 1917 the Senate adopted a very mild form of closure. Upon petition a motion may be made to fix the time for closing debate upon a measure, provided that two days after a written notice by sixteen senators closure may be applied by a two-thirds vote, each senator being limited to one hour's debate and no amendment being entertained unless by unanimous consent. Although the use of this rule has three times been threatened, it has never been applied. In 1918 Senator Underwood introduced an amendment to this rule which would limit debate to not more than one hour for each senator upon any bill or resolution, and not more than twenty minutes on each amendment. After long and extended debate the amendment was lost by a nonpartisan vote.[2]

THE COMMITTEE SYSTEM

Growth of number of committees in the House

Legislation in both the Senate and the House is largely in the hands of committees. At the first session of the first Congress select committees were appointed to consider subjects referred to them. The most important of these was the Committee on Ways and Means in the House and the Committee on Finance in the Senate. To these committees were referred all proposals for taxation and appropriation. From that date on the number of the committees has steadily increased with the growth of business until there are about sixty committees in the House and seventy in the Senate.

The Committee on Ways and Means

In the House the most important committee is still the Committee on Ways and Means. All measures involving taxation are referred to this committee, and since much of the revenue is raised by the tariff, the framing of the great tariff bills falls on this committee. As the tariff is not merely a financial but above all a political and party measure, the committee is considered of great political importance, and its chairman is the leader of the House.[1]

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[1] Senator Tillman alone and single handed compelled the Senate to include an appropriation he desired by threatening to continue his "remarks" until Congress should expire without the passage of necessary appropriation bills, thus making an extra session of Congress necessary

[2] Congressional Record, June 13, 1918, Vol. LVI, No. 154, p. 8356.

The Committee on Appropriations originally in charge of all appropriations

Originally the Committee on Ways and Means recommended appropriations as well. Thus it was able to keep some connection between the amount of revenue raised and the amount of money appropriated. In 1865 a division of functions was made and jurisdiction over appropriation, banking and currency, and Pacific railroads was transferred to committees bearing these names. The vital importance of this change was that the power of recommending appropriations was vested in different hands from those who recommended taxes. Still as all the appropriations emanated from one committee some harmony was preserved. The Committee on Appropriations, however, kept tight reign upon the other committees and was very slow to see the merit of proposals to spend money. In 1867 the chairman of the Committee on Commerce (Reagan) successfully carried a motion to suspend the rules and pass a river and harbor bill without reference to the Committee on Appropriations.[2] In 1885 the Committee on Appropriations received another serious blow when five other committees were given the power to recommend appropriations.[3] The process of distributing the functions of this committee has continued until to-day there are eleven committees having the right to recommend appropriations. Politically it may have been wise to take this course, but financially it has proved disastrous. The leaders of both parties cry out against the waste and extravagance and suggest the return to a single appropriating committee. So strong is the influence of the chairmen of the other committees and so vital the desire of their members to share in appropriations, that reform has been impossible thus far.

The Committee on Appropriations shares this prerogative with eleven committees

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[1] In 1919 the Republican party elected a floor leader other than the chairman of the Committee on Ways and Means It is of obvious advantage to have the floor leader free from committee work

[2] This bill always commands wide support, as almost every member hopes to have some of the government work done in his district. It is popularly known as the "Pork Barrel."

[3] Committees on Foreign Affairs, Military Affairs, Naval Affairs, Indian Affairs, and Post Office and Post Roads.

Military Affairs, Naval Affairs, Post Office, Agriculture

Rivers and Harbors

Interstate Commerce

Foreign Affairs

Judiciary Committee

Of the other important committees in the House, those on Military Affairs and Naval Affairs handle vast sums and prepare far-reaching legislation. But the committee which, in time of peace, handles the largest appropriations is the Committee on Post Office and Post Roads. Recently, the Committee on Agriculture, because of the conservation movement, has attracted much public attention; and the Committees on Rivers and Harbors and on Public Buildings distribute large amounts of "pork" and have earned unenviable notoriety because of their extravagance. The Committee on Interstate Commerce has jurisdiction over the Panama Canal, and, of more importance in domestic affairs, frames the various food bills and regulations for railroads and industry. The Committee on Foreign Affairs usually keeps in close touch with the President and Secretary of State and considers and prepares resolutions of great importance: the declaration of war in 1917, for example, and the McLemore resolution in 1916, the passage of which would have embarrassed the president seriously. The Judiciary Committee has jurisdiction relating to judicial procedure and to the courts and to constitutional amendments. During Speaker Cannon's time the question of the constitutionality of a measure was occasionally referred to this committee. As the committee perfectly reflected Speaker Cannon's conservative theories, reference frequently meant the death of a measure, and the committee was known as "Cannon's Graveyard."

Committee on Rules

One other important committee must be mentioned although not primarily charged with legislation — the Committee on Rules. This committee is one of the organs by which party leadership is exercised. Generally this is done through reporting some change in procedure which will accomplish the desired result, but occasionally the leaders find it necessary to report a rule involving legislation. Thus the establishment of the parcel post was brought about by the adoption of a rule which combined and altered several bills which had been considered.

Other committees

The other committees vary in importance from the Committee on Elections, which investigates election contests, to the Committees on Expenditures in the various executive departments — committees which seldom meet, but which give their chairmen certain perquisites in the way of appointments.

In the Senate perhaps the most important committees are those upon Finance (which frames the revenue measure), Appropriations, Foreign Relations (which, because of the Senate's part in making treaties, is of vital importance), Military Affairs, Naval Affairs, Judiciary, and Interstate and Foreign Commerce; while the committees on Revolutionary War Claims and Industrial Arts and Expositions derive their little importance from the perquisites attached to them.

Choice of committees formerly appointed

At the first session of Congress the committees were elected, but from 1790 to 1911 they have been appointed by the Speaker. This prerogative was jealously regarded and attacked at various times by dissatisfied members.[1] Yet Mr. Reed probably voiced the sentiments of the House, when he said that it was safer to trust a Speaker who acted in the open House than a board which acted in secret.[2] It must be remembered, however, that the make-up of committees seldom represents the Speaker's personal choice but the result of conference with other leaders. Nevertheless, in the revolt against "Cannonism" the Democrats voted that the committees should be elected by the House. Actually they are nominated by the Committee on Ways and Means, approved by the caucus, and ratified by the House. Conferences and bargains probably continue, but under the supervision of the chairman of the Committee on Ways and Means rather than that of the Speaker. Unless the chairman occupies as prominent a place in the public eye as the Speaker, it is more difficult to bring home the responsibility to him. Moreover, it is likely that the party caucus, to which the nominations are submitted, may force some changes apart from the pressure of the majority.

How elected

Committees in the Senate

In the Senate the committees were formerly nominated by a Committee on Selection which was appointed by the caucus chairman. In 1912, however, the Democrats provided for an elected Committee on Committees.

The seniority rule

In both the House and the Senate the rule of seniority is closely followed. New members are placed at the foot of the list of the majority or minority members and generally slowly make their way to the top of the list. Speaker Cannon, however, is said to have made promotions and demotions in order to obtain the most efficient chairmen. Other Speakers may have to a slight extent followed his example, and perhaps all Speakers have varied the seniority rule in some instances to pay political or personal obligations. But in spite of these exceptions and in spite of the protests of dissatisfied members, length of service is rewarded fully as much as ability.

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[1] In 1806, 1832, 1841, and 1881.

[2] Congressional Record, January 17, 1882, 47th Cong., 1st Sess., p. 465.

The effect of the committee system tends to reduce Congress to a body to register the decisions of the committee

In both the House and Senate the committees are very powerful. Constituted so that the majority is always in the ascendancy, their reports are generally accepted in both bodies. And conversely a measure which is not favored by a committee stands little chance of adoption. In the Senate a committee report, even from a party having a safe majority, has to run the gantlet of unlimited debate and is often amended not always in accordance with the wishes of the committee. In the House this happens less frequently. The size of the House precludes much constructive debate, and the power and influence of the chairman is generally supported by the whole party organization of the House. In cases of great political importance a special rule may be reported which forces the party to accept the measure as reported by the committee without change or amendment, or to vote to defeat a measure of great importance to the party. However, this last seldom occurs.

Lack of harmony between committees

In the House the actual legislation is therefore more and more performed in the committees, and the House itself does little more than ratify their decisions. As a result, for legislative purposes, the House is divided into miniature Houses each charged with its particular field. The result is unfortunate. Committees seldom work in harmony. For example, the Ways and Means Committee may reduce the taxes at the same time that the Committee on Rivers and Harbors may undertake an extravagant scheme of internal improvements. Or, as happened in 1917, the Ways and Means Committee may report a scheme for taxation which provides for but a fraction of the amount necessary for the conduct of the government or for the military and naval appropriations. In the days of the Speaker's power it was believed that he, through his committee appointments, particularly of the chairmen, could enforce his leadership upon the House. With strong Speakers this was true, as far as measures of great party and political importance were concerned. But even under Speaker Cannon, whose nickname was "The Watch Dog of the Treasury," the appropriations increased alarmingly. While under the Democrats, pledged to check the Republican extravagance, they exceeded those of the Republicans and threatened a deficit.

Weakens responsibility

The division of power among so many committees has weakened responsibility. In England the Prime Minister is responsible for all the actions of his followers, and the party is returned to power if the country approves of his policy. In the United States no one person can be held responsible. Not the president, for he has no constitutional control over Congress; not the Speaker, for he has lost so large a measure of his power that it would be absurd to saddle the responsibility upon him. Only the committee chairmen can be held responsible, and it is difficult if not impossible to bring home the responsibility to a dozen chairmen in the House and a like number in the Senate. Some of these men are of little prominence, and, while some may hold a position in the public eye, few people understand their part in legislation and are able to fix the responsibility on them. Consequently the individual member passes his reponsibility on to the party, and the party to the committee chairmen. The committee chairmen at most are responsible to their constituencies, and these are usually loyal through the judicious use of patronage and favors.

Combined caucus and committee system may develop party responsibility

In spite of these criticisms it is hard to see how under our system of government the power of the committees could be dispensed with. The Constitution precludes executive leadership through a cabinet. The only other method is legislative leadership by committees and their chairmen. If this is frankly recognized and the action of the committee endorsed by the party caucus, the party as a whole may be held responsible. The workings of the Democrats since 1911 show some possibilities in this direction.

THE PROCESS OF LEGISLATION

The process of legislation :

Bills for raising revenue originate in the House of Representatives; all others, however, may originate in either branch of Congress. While there are some minor differences in the passage of a resolution which originates in the Senate, it will give sufficient information to follow the passage of an ordinary bill originating in the House.

(1) Introduction

Originally when bills were introduced by a member it was necessary to obtain leave; that is, to carry a motion giving the member leave to introduce a particular measure. During the debate upon this motion it was possible to express the approval of the House upon the principle involved and to exercise some supervision. By 1880 this custom had been so relaxed that upon every Friday the roll of the House was called by states and members could introduce bills without leave or notice. In 1890 the present rule was adopted by which a member prepares his bill and places it in the "box" at the clerk's desk. There is no check or supervision upon the introduction of these measures and seemingly no limit to their number. In the first session of the 64th Congress (December, 1915) in a total of two hundred and seventy-eight days there were 26,099 bills and resolutions of which 7020 were Senate bills and 17,798 House bills. The system has the advantage of affording an easy method of introducing measures of importance, and saves time; but it also affords notoriety seekers and extremists the opportunity to give their schemes prominence and publicity. This is unfortunate and sometimes disastrous, for the report that some ill-considered measure was introduced might cause financial panic and alarm among the interests affected.

[Number of bills]

(2) Reference to a committee

All bills and resolutions are referred to the committees having jurisdiction over the subject treated. In the case of private bills the introducer writes the name of the committee to which it is to be referred. In the case of public bills the reference is made by the Speaker according to the rules of the House. Generally there is no doubt as to which committee has jurisdiction over the bill and reference is made automatically by the Speaker's clerk. Sometimes, however, bills are on the border line and jurisdiction is shared by several committees.[1] Whatever reference is made, it is extremely difficult for another committee to get possession of a measure without the assent of the first committee.[2]

Sections of the president's message proposing legislation are likewise referred to committees having jurisdiction over the subject matter recommended.[3]

(3) Consideration by a committee

The proposed measure is entirely in the hands of the committee. It may report it unchanged, it may amend it, it may substitute an entirely different measure for the one referred to it, — for although technically a committee cannot originate a new measure, it may amend by striking out all after the clause "Be it enacted." But generally the committee quietly ignores the measure, — "pigeonholes" it is the word. This is the fate of the vast proportion of measures. Until 1900 there was but little opportunity to force a committee to report. But as a part of the movement to weaken the control of the Speaker and the leaders, a new section was added to Rule XXVII, which allows a member to file a motion to discharge the committee from consideration of a bill of which it has possession for fifteen days. This motion is then entered upon the Calendar of Motions to Discharge Committees and may be acted upon if it is reached when the calendar is called. The relief afforded by this is more seeming than real.

[Subcommittees]

In consideration and framing of legislation the committee acts both publicly and privately, both as a whole and in sections. Generally a subcommittee is formed to consider a special bill, and in the case of appropriation and tariff bills sections are referred to subcommittees. These subcommittees may contain members of the minority, but are always controlled by the majority. In the case of a great party measure the majority frames the bill to suit itself and sometimes submits it to a party caucus before consulting the minority. Strictly speaking, only one report is made, but the minority obtains the advantage of a minority report by filing their dissenting views.

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[1] Such, for example, was the bill laying a tax on oleomargarine. Bills proposing this were referred alike to the Committee on Agriculture and the Committee on Ways and Means, and the bill which finally passed was reported by the Committee on Agriculture.

[2] Speaker Cannon changed the reference of the bill creating an Appalachian reserve from the Committee on Agriculture to the Committee on Judiciary, nominally to consider the constitutionality of the question, although it was asserted that he did so to kill the measure.

[3] See P. S. Reinsch, Readings on American Federal Government, pp. 257–265, for extracts from a debate upon this question, quoting from the Congressional Record, December 13–15, 1905.

[Process of consideration by a committee]

The report is based upon the predilection of the majority, from such information as they can obtain, and subject to both public and private influence. Hearings are generally held upon all important legislation, which, while not exactly open to everyone, afford to almost anyone who has information the opportunity to present it. But the real work of the framing of the bill is done in secret, where the members may be subjected to all kinds of influence and the proposed measure altered by the vote of one obscure member. Proceedings in the committee cannot be referred to on the floor; hence there is great opportunity for secret influence and bargaining, which cannot be exposed. Yet considering the opportunities for and the temptations to faulty or corrupt legislation, the standard is high, and the product while far from perfect or scientific generally accomplishes the objects desired.

(4) Consideration by the House

All bills are put on one of the calendars[1] and reported to the House. It is here that the classification and priority of business is effectively used to enable the House to pass the necessary annual legislation; and at this stage the Committee on Rules frequently alters the procedure in order to pass measures of party importance. On each Wednesday each committee in turn has opportunity to present its measures.

(5) Consideration by the Committee of the Whole

The Committee of the Whole is the House of Representatives acting under slightly different rules and under a designated chairman instead of the Speaker. Technically there are two committees of the whole: one, the Committee of the Whole House, which generally deals with bills on the Private Calendar; and the other and more important, the Committee of the Whole House on the State of the Union. This committee deals with bills on the Union Calendar, which are bills requiring appropriations or raising revenue. The quorum of each committee is one hundred. The previous question cannot be ordered in the committee and debate proceeds under the five-minute rule until it is exhausted or until a motion to close debate upon a particular section is passed. Decisions are not taken by a roll call so that members may avoid going on record.

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[1] See p 336

[Work of the Committee of the Whole]

What constructive legislation the House accomplishes is done in these committees. The bill is read by sections for amendments, and each section is scrutinized by the minority. Frequent *pro forma* amendments to "strike out the last word" are offered for the purpose of eliciting information. The debate is of the rough-and-ready variety with little attempt at oratory but generally directly to the point. Often in the consideration of appropriation bills the result is not fortunate. Bills which have been fully prepared after long consultation and frequent hearings with heads of departments may be overturned. Appropriations may be increased, decreased, or stricken out, and a new appropriation may be added, if it is held to fall within the rulings of the chairman of the Committee of the Whole. It sometimes happens that the most economically minded committee chairman may find his bill swollen out of all proportion by the generosity or the easy method of the House which leads members to vote for one another's requests.

(6) Report to the House

When the Committee of the Whole rises for the day it either reports to the House that it has been considering a bill, or it reports the bill as amended. The chairman of the committee then moves that the bill be read a third time and passed. The House may demand a separate vote upon each amendment or upon a series of amendments, and sometimes, although rarely, additional amendments may be offered. At this stage, moreover, it is in order to offer a motion to recommit the bill to the committee having it in charge with instructions. By a ruling of Speaker Clark these instructions must have been in order as an amendment when the bill was considered by the Committee of the Whole.[1] Usually as an added precaution a motion to reconsider the vote by which the bill is passed is laid upon the table by another motion. The bill is then engrossed, signed by the Speaker, and sent to the Senate.

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[1] House Manual, p 331

(7) Consideration by the Senate

All bills and joint resolutions passed by the House are referred to the appropriate committees of the Senate. With some slight technical changes due to the rules of the Senate the process substantially is the same as in the House. Opportunity is thus given for the friends of a measure to correct the errors and omissions and to restore the measure to its original form. Frequently, however, the Senate amends most fundamentally the legislation of the House, and in matters of appropriation bills the Senate is apt to be even more generous than the House. At times disputes between the Houses have occurred over the right of the Senate to add new material to a bill for raising revenue,[1] but generally the Senate is allowed to amend or recast revenue bills with no more protest than attends other bills.

(8) Conference

If the Senate passes the bill in identically the same form in which it passed the House, the bill is sent to the president and becomes a law upon receiving his signature. If on the other hand one House amends the work of the other, the bill is returned to the House originally passing it. Here one of two courses may be followed. The first one, very seldom adopted, is to agree to the amendments which have been made. In this case the amended bill is passed and sent to the president. The more common method, however, is to disagree to all amendments and to request a conference.

[Procedure and work of conference committees]

Managers, usually three from each House, are appointed by the Speaker in the House and the presiding officer in the Senate.[2] In every case the party in control of each House has a majority from each House. The conference may be either free or with instructions. The Senate has attempted to insist upon free conferences and has protested when informed that the House has given instructions; hence formal instructions are seldom given. The conferees meet in secret and attempt to reach some compromise. In the case of appropriation bills it is common to recommend a figure between the two extremes, or in the case of amendments, for each House to recede from a certain number of amendments in return for the adherence of the other House to a similar number. In the case of legislative provisions the process is not so simple. Technically the managers cannot add any new material to the bill or omit anything which has passed both Houses; but in the endeavor to find common ground sometimes practically new legislation emerges. In fact, in recent years, provisions are adopted by both Houses which are confessedly imperfect, on the understanding that they will be corrected or altered in conference.

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[1] See pp 283–286.

[2] T. P. Cleaves, "Manual in Conferences and Conference Reports" in Rules and Manual of the United States Senate, pp. 433 et seq.

[Result of conference committees]

In case the conferees cannot agree they report the fact to their respective Houses. Then action may be taken instructing the managers to recede or continue their adherence to certain provisions. Finally, one House or the other gives way and a compromise is reached which is accepted by both Houses and sent to the president. The report of the conference committee is in order at any time in both Houses, being a question of highest privilege.

[Criticism of conference committees]

The fact that the conferees work in secret and frequently recommend provisions not acceptable to either House has led to charges of undue influence and even corruption. There is little evidence of the latter, but influence is undoubtedly brought to bear upon the conferees especially by the administration. For example, in 1909 President Taft refrained from interfering or exerting his influence during the passage of the Payne-Aldrich Tariff Bill, but held frequent meetings with some of the members of the conference committee; and it was reported that in 1917 President Wilson utilized his whole influence, which had failed in the Senate, to compel the conferees to abandon the idea of a food commission in favor of a food controller. Without some such device it is difficult to see how two jealously independent bodies could be brought to an agreement, but the fact that it has worked so well has made both Houses somewhat careless in the original consideration of the measure. Thus, in 1917 the Democratic leader openly stated in the House that the war revenue bill was defective, but it was passed with the hope that the Senate's revision and alteration would correct some of the glaring errors. During the discussion of the Food Bill in the Senate various provisions were allowed to be incorporated with the knowledge that they would be eliminated in conference.

(9) Presidential approval

When the identical bill has been passed by both Houses and enrolled and signed by the presiding officers it is sent to the president. He may sign the bill, or allow it to become a law without his signature, or return it to the House in which it originated, without his approval, stating his reasons therefor. This last, the veto message, is a highly privileged matter, and a motion to refer it to a committee or to discharge a committee from consideration of it is always in order. If two thirds of the members present in each House approve the bill, it becomes a law, in spite of the president's objections.

CHAPTER XIV

CONGRESS AND THE CONSTITUTION

THE POWERS OF CONGRESS

The constitutional grant of authority to Congress is found chiefly in Article I, Sect. viii. Here are eighteen clauses giving certain definite powers. From these clauses as interpreted by Congress and the courts is derived the authority for all the laws of the United States. Although the functions performed by the government will be discussed in detail in subsequent chapters it is necessary to obtain a comprehensive view in order to appreciate not only the actual work of the government but the potential and latent powers granted to it as well. This survey can best be secured by a classification and a brief description of the powers granted to Congress.

Financial and monetary powers

Congress is given ample power in financial and monetary matters. The power of taxation and borrowing without limit as to amount is freely granted. This remedied one of the greatest defects of the Articles of Confederation and gave Congress the power to provide for debts, past or future, and thus to give value to bonds; and to provide for the common welfare of the nation by taxation. It is worth noting that while the legislative power is limited to subjects granted by the Constitution, the taxing power is not. Thus Congress may not legislate for the common welfare, but may levy taxes and appropriate money for the common welfare. The limitations upon the taxing power are few and are chiefly in the interest of uniformity. Two limitations, however, must be noted here. Congress may not tax any article exported by a state, thus making export duties impossible. Again, all direct taxes, which is interpreted to mean poll taxes and taxes on real estate and personal property, must be apportioned according to the population. As interpreted by the Supreme Court in 1895, taxes upon incomes were direct taxes,

Taxes

Direct taxes

Income taxes

and since they could not be apportioned they could not be levied. This decision was altered by the passage of the Sixteenth Amendment, by which taxes on incomes from whatever source derived need not be subject to apportionment. The fact that Congress has not merely the power to lay but also to collect taxes, makes real taxes of the federal taxes, quite unlike the requisitions demanded by the Continental Congress. A federal tax falls not upon a state but on individuals and is collectible not by state but by federal machinery.

Coin money

Legal tender

The power to coin money and to regulate the value thereof is also a necessary one, and, taken in connection with the prohibition laid upon the states, it has given to Congress the complete monopoly in this field. It is to be remembered that the prohibition upon making anything but gold or silver legal tender applies to the states and not to Congress. Congress can issue money of any sort, fix the value and make it legal tender for the payment of both public and private debts, or, as in the case of the greenbacks, for the payment of private debts but not for those due to the government. To protect itself a special clause allows Congress to punish counterfeiting the obligations of the United States.

Commerce and business

Extensive interpretation of the word "commerce"

The entire regulation of all commerce, interstate and foreign, is in the hands of Congress. When it is seen how wide an interpretation is given by the courts to the word "commerce," the extent of this power may be realized. Commerce is intercourse, and commerce includes all agencies by which commercial intercourse is carried on. Again, while Congress may not legislate directly concerning the welfare of the country, it may regulate commerce in the interests of that welfare, and since practically all business is engaged in interstate or foreign commerce, Congress thus supervises and controls such business.[1] Thus the Pure Food legislation, the Anti-Trust laws, the Adamson Law, and countless other acts derive their validity from this grant. In like manner, internal improvements and the large sums spent on rivers and harbors are justified by this clause.

Closely connected with the grant of commercial power is the clause which allows Congress to pass laws for the issuance of patents and copyrights. These establish limited monopolies for their holders, which within recent years have proved troublesome in the light of the regulations against the restraint of trade.[1]

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[1] See Chapters XIX, XX.

Patents and copyrights

To assist in commercial intercourse Congress is given power to establish post offices and post roads and hence to operate them and to prescribe their functions and the regulations controlling them. Only within recent years have these powers begun to be used to their full extent. With the establishment of rural free delivery, postal savings banks, and parcel post, the government is just beginning to utilize some of the powers latent in this grant. Since Congress may establish a post office, it may regulate what may be sent by post. This gives another opportunity for the federal government to legislate concerning the welfare of the country. Acting on this power many laws have been passed excluding objectionable or fraudulent matter from the mails. In 1917 this clause was invoked to establish a quasi-censorship. By the Espionage Act it was made unlawful to mail seditious matter, and all papers published in foreign languages were required to secure permits from the Postmaster-General or to file translations of the articles they printed. Thus the provision that Congress shall make no law concerning the liberty of the press was not violated, and the interests of the government were safeguarded.

Post offices

Postal savings banks

Fraud orders

Congress is also given authority to establish a system of weights and measures, and might impose the metric system on the nation. So far all that Congress has done in this line is to make the use of this system lawful but not obligatory. A bureau of the government is performing a most valuable work in establishing standards of weights and measures.

Weights and measures

The military power of Congress is most adequate and far-reaching. The power to declare war, which stands first on the list, is the least important of the powers granted. As has been seen, the president in his capacity as commander in chief can take such steps that war is inevitable or that war may actually exist. Hence congressional action may be confined to the passage of a resolution that a state of war does exist. The power to make peace is not given to Congress but is shared between

The power of defense

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[1] See Chapter XX.

the president and the Senate in the treaty-making power. The president is made commander in chief of all the military and naval forces of the United States by the Constitution and may thus direct the military operations of the government independently of Congress. No appropriation for the support of the army may be made for more than two years. Beyond these restrictions no limitation exists on Congress. An army may be raised of any size, quasi-universal service may be established, as was done in 1917, or universal military service may be made obligatory, as is even now demanded by some. Congress may employ the militia of the several states for the maintaining of order and the repelling of invasions, and Congress can make rules for the disciplining of the forces of the United States. It should also be remembered that the power of taxation and of borrowing money, and the unlimited legislative grant in clause 18, to make all laws necessary and proper to carry into effect any of the powers granted to Congress, may be used. Once let war be declared, and all means not expressly forbidden by the Constitution may be utilized to further it. In this respect the United States has greater potential powers than almost any European state, and with the resources at its command could become the most powerful and militaristic state in the world.

Special legislative grants

In four clauses Congress is given special legislative authority. It may establish uniform rules for naturalization, thereby coming into close relations with the president in the exercise of his power to make treaties; it may also define and punish piracies and felonies committed on the high seas, again entering the field of international affairs, which is otherwise generally reserved to the president. Congress may pass, and has at different times passed, uniform rules for bankruptcy, overriding the laws of the several states. Congress also exercises exclusive legislative power over the District of Columbia and all federal territory.

Punishment for crime

Congress may not define crimes or establish a general criminal code for the United States. Treason is defined by the Constitution. Congress may define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. That is all. But under the legislative grant to make laws necessary and proper for executing the powers granted to the federal government, Congress may provide punishments for the breach of federal statutes. Thus, while Congress may not define or punish larceny in general, it may both define and punish larceny from an instrument of interstate or foreign commerce — a freight car, for example. Almost all the penal legislation of 1917–1918 was passed not under the limited power to define and punish certain crimes but under other clauses, such as the regulation of commerce or of the post office, the right to raise and equip armies, and so forth. The statutes themselves did not define new crimes but provided punishments for the breach of or interference with the execution of the laws of the United States.

Judicial powers

In two ways Congress exercises judicial functions. In cases of impeachment the articles are prepared and the trial conducted by the House of Representatives, and the Senate, sitting as a court, renders the verdict and gives the sentence. More important than this seldom-used power is the duty of Congress to establish tribunals inferior to the Supreme Court. The Supreme Court is the sole judicial body provided for in the Constitution. It would be physically impossible for the court to exercise all the judicial functions necessary in the United States. The section establishing the Supreme Court looks for the establishment of inferior tribunals by giving to the Supreme Court very little original jurisdiction and by providing that in all other cases its jurisdiction shall be appellate. Thus practically all the necessary means for enforcing the laws depend on congressional enactments. Congress has established the whole system of federal courts. Congress may alter and abolish, and has altered and abolished, some of the courts it has established. It is quite as important to remember the fact that Congress, in establishing a court, can determine its jurisdiction. Thus the judicial system, while in theory an independent department, is actually very much under the control of the legislature. It is fortunate that this control has remained potential and that the courts have been allowed very generally to remain independent of and untouched by the party conflicts in Congress.

Executive powers

Congress has few direct executive powers. Nevertheless in the use of its legislative power it may influence and control the action of the executive. Even more, unless Congress established the executive agencies by legislation, the wheels of the government would stop. Through the definition of the duties to be performed by these executive agencies and through the power of the appropriation of funds Congress actually exercises considerable executive control.

The "elastic clause"

Finally, Congress has power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Around the interpretation of "necessary and proper" have waged great constitutional battles. In this place it is well to call attention to the power possessed by Congress to pass laws to carry into execution (1) the foregoing powers, and (2) all other powers anywhere granted to the government. The "foregoing powers" have just been described briefly; but wide as they are, they are greatly extended by this clause. The whole complicated legislation concerning commerce is considered merely the necessary and proper means of regulating it. Other examples have been briefly discussed. (3) This legislative grant applies not merely to clause 18 just classified but to any powers granted anywhere in the Constitution to the United States or to any officer. The whole executive department, aside from the president, owes its very existence and continuance to legislation passed under this clause. The executive power of the president himself as granted by the Constitution is small compared with the functions he exercises as the result of congressional enactments. It is this clause as interpreted by the courts, together with the judicial interpretation put upon the other powers granted to Congress, that has made it possible for the Constitution to retain its original form and yet to be adapted to such changing conditions.

CONGRESSIONAL LEGISLATION AND THE CONSTITUTIONAL LIMITATIONS

Definition of legislative power

"All legislative powers herein granted shall be vested in a Congress of the United States. . . ."[1] Legislative power may be defined as the power to declare the will of the sovereign state in the form of law, that is, in a rule enforceable by the courts. By this wide definition legislative power would include not only the power to adopt, amend, or repeal statutes but also, on the one extreme, to make or amend constitutions and, on the other, to pass municipal by-laws or ordinances. In the article under consideration no such legislative power is granted to Congress. The phrase is used in a restricted sense. Not all the legislative power of the nation is vested in Congress but only such powers as are "herein granted" by the Constitution. Congress, therefore, unlike the English parliament, which is sovereign and possesses plenary legislative power in the fullest sense of the definition given above, is subordinate to the Constitution and has only such legislative powers as are granted to it.[1]

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[1] The Constitution of the United States, Article I, Sect. i.

Limitations on legislative powers of Congress

The legislative powers of Congress are therefore subject to various limitations: (1) the limitations set by the Constitution in the different grants and prohibitions; (2) the limitation which makes the president a part of Congress and requires his assent to all legislation unless two thirds of each House should override his "veto"; (3) the judicial limitation which all courts necessarily apply in interpreting or declaring the meaning of statutes passed by legislative bodies.

Constitutional limitations enforced by the court

The political limitation, that is, the part played by the executive in legislation, will be discussed in the following section.[2] The constitutional and judicial limitations, however, have and will continue to have a great effect upon the process and kind of legislation passed by Congress. In the last resort these limitations are declared by the courts; that is, the Constitution being the supreme law of the land, the judges are therefore obliged to apply its provisions rather than the acts of Congress. In other words, an act of Congress contrary to the Constitution is declared *ultra vires* — beyond the power of Congress to pass — or, in the popular phrase, unconstitutional. This power of the courts to declare acts of Congress void or unenforceable will be treated in Chapter XVI. The grants and prohibitions found in the words of the Constitution are constantly in the mind of Congress, and, by its willingness to pass or by its refusal to adopt different kinds of legislation, Congress interprets and enforces upon itself its own conceptions of the constitutional limitations.

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[1] See pp. 47-57

[2] See also pp. 368-373.

Liberal or loose construction

At different periods Congress has held different interpretations of these limitations. The earliest idea was one of liberal or loose construction. By this theory the so-called "elastic clause" received a liberal interpretation. "Necessary and proper" seemed to mean useful and expedient. Acting on this interpretation Congress established a protective tariff, a national bank, built internal improvements, and made paper money legal tender. Under the influence of Marshall this congressional interpretation was upheld. In 1804 he said:

Upheld by the court

> In construing this clause it would be incorrect, and produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.
>
> Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution.[1]

In the discussion of *McCullough* v. *Maryland*,[2] he used the oft-quoted phrase:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but which consist with the letter and spirit of the Constitution, are constitutional.

Theory of inherent sovereignty

A variation of this liberal construction of the constitutional limitations is seen in the theory of inherent sovereignty. According to this theory the federal government may use not merely all the powers which are expressly granted to it by the Constitution or which are fairly implied in those grants but also those powers which are inherent in every sovereign national government. In 1898 Senator Platt of Connecticut said in the course of a speech upon the powers of the federal government to acquire territory and to establish colonies:

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[1] *U S* v. *Fisher et al.*, 2 Cranch, 358, 396.

[2] 4 Wheat, 316, 421.

> I propose to maintain that the United States is a nation; that as a nation it possesses every sovereign power not reserved in its Constitution to the states or to the people; that the right to acquire territory was not reserved and is therefore an inherent sovereign right. . . .[1]

This theory has not always been repudiated by the Supreme Court, in fact in several obiter dicta the court has seemed to countenance it.[2] In 1906, however, in the case of *Kansas* v. *Colorado*, this theory was thus emphatically disavowed by the court:

Repudiated by the court

> But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, discloses the widespread fear that the National Government might, under the pressure of supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act.[3]

The Wilson-Roosevelt theory

A more recent development of this theory was espoused by President Roosevelt. In one of his addresses he said:

> I cannot do better than base my theory of governmental action upon the words and ideals of one of Pennsylvania's greatest sons, Justice James Wilson. . . . He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations.

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[1] Congressional Record, December 19, 1898, Vol. XXXII, p 287

[2] See W. W. Willoughby, The Constitutional Law of the United States, Vol I, p. 68, for quotations and references to opinions.

[3] 206 U. S. 46, 89, 90.

Accepting this as the Wilson-Roosevelt doctrine, it is evidently quite different from the doctrine of implied powers developed by Marshall. It more nearly resembles the doctrine of inherent powers just discussed, which has been emphatically repudiated by the court. What President Roosevelt's theory means is that changed conditions may bring within the control of the federal government matters which were not actually or by implication given to such control. The correct interpretation would be to admit that changing circumstances might make an extension of the federal control advisable, and to seek sanction for such action through a constitutional amendment.[1]

Strict construction as defined by Jefferson

Sharply contrasted with these theories was that held by Jefferson and the Democratic-Republicans. Thus Jefferson protested against the establishment of the first United States Bank in these words, which may well express the central idea of the strict constructionists:

> I consider the foundation of the Constitution as laid on this ground: That all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of definition. . . .
>
> It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "*necessary*," not those which are merely "convenient," for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any nonenumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.[2]

Once in power, however, the Jeffersonian party was unable to maintain this theory, nor could the Supreme Court under

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[1] W W Willoughby, The Constitutional Law of the United States, pp. 47–51, has a full discussion of the Wilson-Roosevelt theory.

[2] Macdonald, Select Documents of United States History, p. 79.

Marshall be expected to abandon the principles the Federalist party had established. Even the appointment of Taney in 1836 made little change in the process of construction. There was perhaps less readiness to extend the functions of the government under the implied powers; but none in the assertion of national supremacy.

The empiric theory

Another view of the powers of Congress and the constitutional limitations was expressed by Representative Cockran in these words in a speech in the House of Representatives:

> It seems to me that the duty of Congress is to examine closely the condition of the country and keep itself constantly informed of everyhing affecting the common welfare. Wherever a wrong is found to exist with which the nation can deal more effectively than a state, it is he business of Congress to suggest a remedy. If the courts hold that he legislation we consider essential is beyond our power to enact, our duty to suggest a remedy is none the less binding, except that instead of proceeding by the enactment of a law we should proceed by proposing a constitutional amendment. . . . Face to face with a wrong which we believe a state cannot cure, it is our duty to find a remedy some way or other. Our first step must be in the direction of legislation. The only way we can ascertain definitely whether a law which we believe will prove effective is constitutional or unconstitutional is not by abandoning ourselves to a maelstrom of speculations about what the court may hold or has held on subjects more or less kindred, but to legislate, and thus take the judgment of the court on that specific proposal. We can tell whether it is constitutional or unconstitutional when the court pronounces upon it and not before. Even if the court declares it unconstitutional its decision will not reduce us to helplessness. When it drives us from establishing a remedy by legislation it will by that very act direct us to propose a remedy by constitutional amendment. Having framed a suitable amendment and proposed it to the legislatures of the states, our duty will have been accomplished. The final step toward full redress will then be with the bodies most directly representative of the people affected by the wrong.[1]

Objections to empiric theory

No objection can be taken to the theory thus expressed. But several very serious objections prevent the practical working of it. In the first place it should be the duty of Congress itself to heed the limitations placed upon its legislative power and not to force the Supreme Court to negative the work of the legislative branch of the government by the application of the obvious restrictions of the Constitution. Popular criticism is all too ready to call such action judicial usurpation. In the second place the difficulty of amendment of the Constitution makes it almost impossible to secure the assent of the necessary three fourths of the states for any but the most general measures which have been long before the people. Yet, in spite of these objections, this empiric method has been followed to a great extent in determining the legislative powers of Congress. The necessity for federal action has risen, congressional legislation has been passed, and the court has frequently by interpretation or construction found permission implied in the Constitution for the exercise of the needed power.

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[1] P. S. Reinsch, Readings on American Federal Government, pp. 256–257, quoting from Congressional Record, Apr. 20, 1906.

RELATIONS OF THE EXECUTIVE AND THE LEGISLATURE

Effect of colonial experience on constitutional relations of the executive and the legislature

It has been said that the framers of the Constitution patterned the presidency upon the model of the English crown; that they attempted to reduce to writing the vast but vague powers of the English sovereign and so to limit them as their unfortunate experience with George III had seemed to teach them was necessary. Unfortunately their observation was based upon a period when English institutions were not functioning normally and their information was derived from the writings of lawyers of a previous age rather than from the actual experience of parliamentary leaders. They feared and dreaded an executive with the legal powers of the English sovereign, but they failed to comprehend how the existence of these legal powers was controlled by political customs which rendered them not merely innocuous but actually of the greatest use in the operation of the government. On the other hand, their experiences with weak executives had been equally disastrous. The executive power which the Continental Congress and the early governors of the states lacked had taught the folly of absolute legislative supremacy over the executive. As they solved the problem they created a strong independent executive, independent of Congress in method of choice and term of office, strong in administrative and executive functions, almost beyond the power of Congress to control. They then created an equally independent legislature, giving to it important powers so wide and capable of such extensive interpretation that they have proved adequate for the development of over a hundred years in the changing conditions of war and peace. Their next problem was to coordinate and harmonize these apparently contradictory and independent institutions. A Congress all-powerful in legislation and a president all-powerful in execution would probably fail to express the will of the state. Legislation and administration, despite the theories of Montesquieu, cannot be completely separated.

Various methods have been attempted to make sure that the will of the legislature shall be carried into execution. In classic times the Athenian assembly by direct votes not merely made laws but chose generals and directed their military operations. Centuries later the New England town meetings attempted to exercise similar functions. In both instances, however, as must happen in all cases when the state or community becomes large and the administrative or executive functions become numerous and complex, this system broke down. After long experience and bitter failures England developed another method, the cabinet system or parliamentary government. By this the executive is but a committee of the legislature to execute its will. The cabinet holds office only upon the sufferance of Parliament and its every act is subject to the critical scrutiny of that body. Few limits are placed upon the executive power in the English constitution and none upon the legislative power. Parliamentary sovereignty means truly that Parliament is legally supreme, not merely in legislation but in administration as well. The system has worked well in England because it was the result of development and was founded upon the existence of political parties which expressed in general the main divergences of English opinion. It has not been so successful in France because, as President Lowell has shown, such conditions did not obtain there. It might not continue to operate with the same smoothness in England should the parties multiply or divide upon class lines.

English parliamentary system works well because of English conditions

In 1787 no national parties existed in the United States. At best, political parties were little understood by the framers of the

Fear of political parties made cabinet system impractical

Constitution, who were familiar with them in their revolutionary rather than in their constructive capacity. Political parties had succeeded in thwarting the government of Great Britain and for that very reason they were feared in the government about to be established. Parties savored too much of the mob at one extreme and of factions at the other. To utilize them as agents of the government seemed impossible. Therefore the English system of cabinet government was impractical. The presidential system which the framers erected was made workable only by breaking down the theory of separation of powers upon which it was founded. Unity of action is secured by making the president a part of Congress and by giving Congress some control over the president.

In several ways the Constitution joins the president and Congress. In legislation the president is made a part of Congress in that he may recommend legislation and in that his assent is required for every law, except when a veto is overridden by a two-thirds vote. The working of the message and the veto have been discussed, but attention must be called to them again as a means of influencing Congress.

The president's message

The president, as the official head of his party, speaking through his message, addresses a far larger audience than Congress. The public throughout the country is more quickly moved by the appeal of the president than by the words of any other man. Its emotion may be and frequently is translated into action in the shape of pressure brought to bear on a senator or representative. An examination of almost any number of the Congressional Record will disclose numerous resolutions from organizations, and even private letters, asking for action of a certain sort. The shrewd politicians in Congress know how to gauge these demands. In some cases they may be ignored, in others seeming compliance must be shown; but when a widespread popular demand is started by a presidential message it is dangerous to disregard it. Few members of Congress control their constituencies to such a degree that they can with safety defy a president of their own party.

The president's veto

The veto, as well, serves as a means to control congressional legislation. Only six times within a generation has Congress been strong enough to override the disapproval of a president. But something more than negative control is necessary if the president is to carry through his legislative program. The threat of veto accomplishes this. In 1909 President Taft abandoned a speaking tour and under the threat of vetoing the Payne-Aldrich Tariff Bill extorted certain modifications which made that act more to his liking. The veto of such an important measure framed as the sole work of a special session of Congress would have been disastrous in its effect on the party. Likewise President Taft vetoed the Army Appropriation Bill of 1912 because it contained legislation of which he disapproved, and the army was thus left without resources. Not until three special resolutions continuing for short periods the appropriations of the previous bill had been passed did Congress finally surrender and remove the obnoxious legislation. So also in 1917 President Wilson scored a victory over the Senate by intimating that he would veto the Food Control Bill unless the clause establishing the obnoxious congressional committee on war expenditure was removed. Crises and the pressure of necessity work for executive success, and the threat of a veto often succeeds in gaining the desire of the president. This is particularly true in the first years of an administration.

The president's appointments

The president's power of appointment is a potent means of executive control. Even the framers of the Constitution referred to appointments to office as "the principal source of influence," and Morris bluntly declared that "the loaves and fishes must be used to bribe the demagogues."[1] Again, this is particularly true in the early years of a president's term, when numerous appointments are to be made. Congress may be kept on its good behavior and rendered compliant by the hope of reward. This was the course followed in 1913, when none but the most necessary appointments were made until President Wilson had secured the enactment of his very extensive legislative program. Opposition to the president may be punished by loss of patronage which is literally often the breath of life to a politician.

The executive department furthermore communicates its desires in legislation by the very direct method of drafting

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[1] H. J. Ford, The Rise and Growth of American Politics, p. 276, quoting from Madison's "Journal."

Administration measures

[contrasted with government bills in Commons]

bills it wishes to have adopted. These administration measures occupy a very different position from the government bills in the English Parliament. In the Commons, the cabinet, that is, the executive, prepares measures, introduces them, discusses and defends them, and pilots them through the legislative stages. This control is exercised through the actual or implied threat of resignation and the consequent possibility of a dissolution of Parliament and a general election, should the measure be rejected or amended against its wish. In the United States, administration bills have no such preference. The executive of some department discovers some serious deficiency, some pressing need, or is hampered by some previous legislation. A bill is drafted by the department concerned and sent to the proper committee, with the request that it be introduced and passed. The bill must pass the committee, which nominally becomes its sponsor, and take its chance of consideration along with other measures, which may be equally privileged,[1] and run the gauntlet of both Houses. If the measure is of minor importance, or one which is not too radical, or one on which there can be little difference of popular opinion, the committee is generally successful in securing its adoption. More important measures also on which the party has expressed its opinion, when backed by the influence of the president, are almost always sure to be passed with little trouble. Thus, in 1917 the Selective Draft Bill was drawn by the Secretary of War with the approval of the president. It was rejected by the chairman of the Committee on Military Affairs of the House, and carried only by the efforts of the minority. Even then it was subject to very serious amendments. In England such a course would have been impossible. The cabinet would have refused to accept amendments of such a character and would have compelled the adoption of its ideas or would have resigned. In the United States the administration gets along as best it may. Congress, and particularly the Senate, is very sensitive over executive influence; and it may be suspected that the mere fact that a measure is drafted by the administration is sufficient to cause the most searching criticism or opposition from certain members. Nevertheless, the custom is quite firmly established and constantly becoming stronger. This is especially true in time of war when Congress passes administration bills without question and with little debate.

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[1] See Chapter XIII.

Executive may not sit in Congress

One method of control is denied to the executive department which is used with great effect in parliamentary systems of government. This is the right to sit in Congress. It is true that the president may address Congress, but never since the days of Washington has he been questioned and given the opportunity to defend his position. The members of the president's cabinet, however, who are responsible for and better informed concerning the legislation they desire, have no such opportunity. It is true that they may be summoned before a committee and examined, and that they may defend or explain their position, but they cannot appeal directly to Congress. In January, 1918, this was apparently circumvented. The Senate Committee on Military Affairs was examining Secretary Baker, who asked for permission to address a joint session of both Houses. When this was refused, he suggested that the committee hearing might be held in a larger room, which made a more numerous audience possible. The lengthy statement he then made, uninterrupted by questions, was fully and widely reported in the newspapers and did much to alter the impression which had been created by the hostile examination he had been subjected to. Without questioning the sincerity of the motives of the committee or defending the policy of the department, the incident is suggestive of the influence which a resourceful secretary might exert on Congress.

LEGISLATIVE CONTROL OVER THE EXECUTIVE

In the exercise of the powers granted by the Constitution the president is supreme. In fact any purely executive act as such, whether founded on a constitutional grant or on a congressional statute, is beyond the control of Congress. Nevertheless Congress in several ways attempts to control the president.

Although Congress cannot summon the president before it and demand an explanation of his acts, it may summon the heads of departments and other subordinate executive agents

Committee hearings

before congressional committees. These committee hearings and investigations are for two purposes. The committees charged with legislation, particularly when dealing with bills desired or framed by officers of the government, must understand the necessity for such legislation, and thus give the department concerned an opportunity to state its case. Congress may be displeased with the action of some official or the administration of some law or the general policy pursued by the department. The committee having the matter under its jurisdiction, more rarely a special committee, summons the officers before them for the purpose of investigation. An example of congressional investigation, quite unique in origin, is to be found in the Ballinger case. Secretary Ballinger of the Department of the Interior was accused of laxity in the administration of the land laws. At the request of President Taft a joint resolution was passed providing for an investigation of his conduct. He was exonerated from all charges of official misconduct, but, being condemned by popular opinion, resigned the following year. In 1918 the Senate Committee on Military Affairs conducted an examination, already referred to, with the apparent intention of forcing Secretary Baker from office. In spite of senatorial opposition and criticism both in and out of Congress, Secretary Baker retained the support of the president. Although Congress may demand information and attempt to investigate any officer, the president may direct that officer not to furnish the information or to answer the questions. The officer is responsible not to Congress but to the president, who appoints him and may remove him. Congress may censure and may ask for removal but cannot compel the president to obey its demand. Only by the abolition of the office by legislation or by impeachment can the officer be ejected by Congress.

[Ballinger investigation]

Congress may control the executive indirectly

Although Congress cannot directly control executive action, it can do a great deal indirectly by means of legislation. Only a small part of the executive activities are founded upon constitutional grants. Here Congress is very influential. It may refuse to pass bills giving the president greater or new executive powers. In general legislation it has been seen that the president, with the prestige of party leader, can sometimes arouse public opinion so that Congress will pass the desired law. To refuse to follow the accredited leader would savor too much of mutiny and would furnish too good a point of attack for opponents. Not so with bills designed to increase the purely executive power. Here, as was seen in 1918 in the case of the Overman Bill, framed to allow the president to alter and combine the various executive agencies for the more efficient prosecution of the war, even the members of the president's own party felt safe in attacking the measure on the ground that it involved an unwise extension of the executive power.

(1) by refusing additional executive power

Congress may also thwart the president and control his action by the passage of legislation requiring the adoption of a certain policy or directing the performance of certain acts. It is true that the president's approval must be secured for the legislation unless Congress is prepared to override his objections, but oftentimes such directions are found in a section contained in a measure otherwise satisfactory. Rather than lose the advantage of the whole piece of legislation, the president may accept the objectionable clause. The executive departments of the government are all founded upon acts of Congress not always wisely conceived. Thus President Taft disapproved of the creation of the Department of Labor; and President Wilson has been greatly hampered by the rigid legislative distribution of functions in many departments and bureaus. What Congress has enacted only Congress can repeal. President Roosevelt, however, circumvented congressional action in the case of the Panama Commission by vesting all the authority in Colonel Goethals and ordering the two other commissioners to follow his directions.

(2) by refusing to pass legislation

Appropriation bills give Congress an opportunity to review the acts of the executive departments. This review may be searching, conducted in good temper, and may disclose the necessity for improvements. It may, on the other hand, degenerate into petty criticism and personal attacks. Of such a nature was the Army Appropriation Bill of 1912, which contained a clause which was designed to prevent General Wood, though he was not mentioned by name, from again becoming Chief of Staff in the army in time of peace. The Sundry Civil

(3) by appropriation bills

Appropriation Bill of 1913, already mentioned, was an obvious attempt to control executive action. In the bill was a proviso that none of the money granted should be used for the prosecution of labor or agricultural organizations on account of alleged violations of the anti-trust laws. Both these bills were vetoed by President Taft, and Congress was forced to remove the objectionable clauses. Appropriation bills again attempt to control executive action by including provisions for general legislation. This practice of attaching riders has already been discussed.[1] On the whole it may be asserted that in a struggle between the president and Congress over a general appropriation bill carrying riders, the president will win. Lack of appropriations would stop the wheels of government, which is unthinkable. Consequently resolutions omitting the controversial matter are passed, and the president wins the point temporarily. The pressure of opinion generally comes to his aid, and Congress drops the obnoxious clause. The contention, however, may be revived as a separate measure with somewhat better chance of success.

[Riders]

(4) by impeachment

The last and last-used means of control is impeachment. Impeachment of the president for the use of his executive powers in a manner displeasing to Congress is almost impossible politically. Impeachment of subordinates for anything less than a serious crime is unthinkable. As Lord Bryce has well said, "a steam hammer is not used to crack nuts."

In recent years the executive is stronger than the legislature

Comparing the relative powers of the executive and legislative departments, it may be asserted safely that the president overshadows Congress. Lord Bryce in 1888 wrote of the president that "he is strong for defense if not for attack."[2] Recent experience has proved, however, that the president, through emphasizing his position as the leader of his party, has become strong enough to force his will upon even the most recalcitrant members of the party. The administrations of McKinley, Roosevelt, Taft, and Wilson, covering over a quarter of a century, give ample evidence of the changed position of the president. These four presidents had most divergent characteristics and personalities, and made very different kinds of popular appeal, but they had this in common — they all dominated Congress and obtained from it, often after a struggle, practically all they desired. That this should be true of the administrations of McKinley and the second administration of Wilson is not remarkable, for during these terms the United States was engaged in war. Nor is it strange that the Democratic party supported President Wilson in his first administration, for the Democrats had wandered in the wilderness for sixteen years and came to power pledged to a very definite program. But in the administration of President Taft a very different condition existed. The President, by temperament, habit, and training, would be expected to maintain the old constitutional relations which existed in previous administrations. At the end of the long session of his first Congress he had forced through every measure he demanded. "No such array of 'inspired' or dictated legislation had ever issued from the halls of Congress as that passed in June, 1910."[1] This was the more to be wondered at because the Republican party had already shown unmistakable signs of the split which was to divide it. It should be remembered and emphasized that this legislation was not personal but was the passage of laws demanded by strong popular opinion. It was the president as spokesman of his party dominating Congress rather than the executive usurping the functions of the legislature.

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[1] See p. 219.

[2] American Commonwealth (rev. ed.), Vol. I, p. 226.

Executive enforces laws according to its discretion

Finally, it should be remembered that every law that is passed by Congress is executed by the president and his subordinates. Congress may grant or withhold powers, may direct the performance of certain things, but in the application of every law there are numerous questions where judgment enters. Judgment, or the discretionary power, is the prerogative of the executive and is beyond the reach and control of either the courts or Congress. In this sphere and in these acts the president and his subordinates are responsible solely to the electorate. In countries where parliamentary government is established every executive act, whether administrative or political, is subject to the judgment of the legislature, which chooses the executive. In the United States the president, holding office for four years, cannot be questioned or removed by the legislature except by impeachment, until the expiration of his term. So notwithstanding the constitutional checks upon the legislative power of the president, he is singularly free in the enforcement of the laws. Congress may refuse to pass the legislation desired or deny the appropriations asked for, but once the law is passed or the appropriation made the execution is in the hands of the president. He may be harassed by but he need not fear Congress. He may be forced to forego some parts of his program, but he remains in office free to use his judgment in the execution of the laws and to give the tone he desires to his administration.

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[1] J. F. Young, The New American Government and its Work, p. 18

CHAPTER XV

THE JUDICIAL SYSTEM OF THE UNITED STATES[1]

Courts established by Congress

It is sometimes incorrectly said that by the article on the judiciary the courts are established as an independent department of the government. Or, to put it more popularly, the Constitution creates the courts. Such is not the case. It is true that the Constitution provides that the judicial power shall be vested in one Supreme Court and in inferior courts, but by this provision the courts do not come *ipso facto* into existence. The action of both the executive and legislative departments is necessary. In the first place the number and compensation of the justices of the Supreme Court must be determined by Congress and fixed by statute. Even after the statute is passed the president, with the advice and consent of the Senate, must appoint the judges. Thus, since the organization and composition of the court are dependent upon Congress and the president, it is possible for Congress to increase the number of judges, and with the connivance of the president to "pack" the court so that a majority out of sympathy with Congress may be overwhelmed. Or, on the other hand, Congress may, as it did during the administration of Johnson, enact that vacancies should not be filled and thus reduce the number of justices. Such actions, however, would be unconstitutional in the sense that they amounted to a violation of the spirit of the Constitution; ut that they would be illegal, in the sense that they were open o punishment, would be difficult of proof.

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[1] The judicial power of the United States shall be vested in one Supreme ourt, and in such inferior courts as the Congress may from time to time rdain and establish. The judges, both of the Supreme and inferior courts, all hold their offices during good behavior, and shall, at stated times, receive r their services a compensation, which shall not be diminished during their ntinuance in office. — The Constitution of the United States, Article III, ct. i

Congress controls appeals

In another way Congress may control the Supreme Court. As will be shown when the jurisdiction of the courts is discussed, Congress has power to extend or to limit the appellate jurisdiction of the Supreme Court, and has not hesitated to use this power. Congress might allow appeals in all cases and so overwhelm the court. Congress might vest, and under this power has vested, the final decision of certain cases in the inferior courts, generally, however, to relieve the Supreme Court of a part of its burden which at times has threatened to overwhelm it. In one instance, however, Congress by statute took from the Supreme Court, whose decision it feared, the jurisdiction of a case already under consideration and vested the final decision in an inferior court whose decision was agreeable to Congress. To this rather high-handed proceeding the Supreme Court assented and, in dismissing the case, said:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[1]

Congress may abolish all courts below the Supreme Court

Concerning the inferior courts the power of Congress is even more extensive. These courts are ordained and established by congressional act and therefore at any time may be abolished by statute. Congress has several times exercised this power. The earliest and most recent instances are due perhaps to political or partisan motives. In 1802 the Jeffersonian Republicans abolished the system of Circuit Courts established by the Federalists in the previous year. And likewise the Democrats in 1913 abolished the Commerce Court. In 1911, however, both parties by joint action, reorganized the whole system of federal courts and abolished the Circuit Courts, an action taken on the recommendation of the Bar Association from unpartisan motives. In cases where courts are abolished, the judges are transferred to other courts in order that their constitutional rights of office and compensation may be preserved.

Congress determines jurisdiction

The power of Congress to determine the jurisdiction of th inferior courts is greater than in dealing with the Suprem

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[1] *Ex parte McCardle*, 7 Wall. 506–514.

Court. In only three instances is the jurisdiction of the Supreme Court original. In all other cases which may come before the United States courts — and these include the application of the laws of the United States — Congress may designate which court shall have jurisdiction, whether it shall be exclusive and whether it shall be final. It is thus possible, as has been done in the Judicial Code of 1911, to extend the jurisdiction of the lowest court and to limit the appeals to next higher courts and the Circuit Court of Appeals. It should be said, however, that this was done not so much to limit the jurisdiction of the Supreme Court as to relieve the congestion and to make the final decision of the case more speedy. Nevertheless, this action is an instance of the legitimate power of Congress over the courts, and should go far to dispel the fear sometimes expressed of "the tyranny of an appointed judiciary." Congress, not the courts, makes the laws under which the courts operate.

Appointment of judges

The judges of the Supreme Court are appointed by the president with the advice and consent of the Senate. By custom, the judges of the inferior courts are likewise so appointed, although Congress might by law vest their appointment in the president alone, or in the higher courts, or in any department. The nearest that Congress has come to this was to allow the Chief Justice to assign the judges of the Circuit Court to the Commerce Court. But in every instance the original appointment is made by the president with the advice of the Senate.

Influence of politics on appointments of justices of the Supreme Court

The appointing power has been used and doubtless is often used for political purposes. When the Jeffersonian Republicans came into power in 1800, the courts were overwhelmingly Federalist in tone, but Jefferson and his successor, by filling the vacancies as they occurred, slowly changed their attitude to the point of view held by the dominant party. At the close of President Taft's administration all but one of the judges of the Supreme Court had been appointed by Republican presidents and the majority by President Taft. It thus may happen not merely that one party may be overwhelmingly represented but that the school of thought of a single president may be perpetuated long beyond his term of office. This was particularly true in the case of the appointment of John Marshall by John Adams, the last Federalist president. Marshall, as Chief Justice from 1801 to 1835, held the court to the Federalist view of the Constitution throughout the Jeffersonian period and into the Jacksonian period.

Effect of politics on appointment of judges in inferior courts

In the appointment of the judges of the Circuit, District, and other United States courts, the same motives are operative, and since the position of the judges is not so conspicuous, it may be, as is sometimes charged, that less worthy motives are the compelling ones. But whatever may be charged in the heat of conflict, the fact remains that, with but one or two exceptions and those in previous generations, the justices of the Supreme Court have never been accused of political bias. With a slightly larger number of exceptions, the same assertion would hold true of the justices of the other courts. But although partisan partiality is seldom shown, charges, rather loosely made, have been leveled against the judiciary on the ground of personal or class interest. In an attempt to correct or at least to neutralize this by publicity, an amendment was added in the House to the appropriation bill of 1913, requiring the president to make public the names of those recommending any judge he might appoint. Although it may be possible to ignore this provision, as President Cleveland did an analogous resolution on the part of the Senate,[1] the spirit which prompted the action is significant of the present critical attitude towards the judiciary. That this distrust is warranted cannot be demonstrated; in fact, considering the large number of federal judges, the vast number of cases before them, and the complexity of the issues presented to them for consideration, the number of instances for legitimate dissatisfaction is surprisingly small. Moreover, as compared with the judiciary of the states, the federal courts are less harshly treated by the critics and their excellences more ungrudgingly recognized.

Judges hold office for life

All judges of the United States, whether of the Supreme or inferior courts, hold their offices during good behavior. It is rue that by law the justices of the Supreme Court may retire pon a pension at the age of seventy-five, but this is not obligaory. Indeed, it was rumored that a recent chief justice delayed

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[1] See pp. 187–188.

No retiring age

his retirement because he feared that the well-known attitude of the president might be reflected in the appointment of his successor. Until a justice reaches the retiring age fixed by Congress, he cannot retire on account of ill health, or disability without forfeiting his salary, a fact which led Congress, in the case of Justice Moody, to pass a special act granting him a retiring allowance. Federal judges can be removed only by impeachment. This, however, has been seldom resorted to, and still less successfully prosecuted. Proceedings have been initiated only once against a Supreme Court justice — when the Jeffersonian party was struggling to control the court — and then they were unsuccessful. Judge Pickering of the New Hampshire District became insane, and impeachment on the ground of violence furnished the only method of removal. Two other federal judges, the last in 1913, have been convicted and removed, and several have resigned rather than face trial.

Subject only to removal by impeachment

THE ORGANIZATION OF THE UNITED STATES COURTS

By the revised judicial code of 1911 the judicial power of the United States is vested in a series of three courts — the District Court, the Circuit Court of Appeals, and the Supreme Court — and in three special courts — the Court of Claims, the Court of Customs Appeals, and the Commerce Court, which was abolished in 1913. In addition, there are special courts, like courts of the District of Columbia and the Territorial Courts.

The District Court

The lowest court in the series is the District Court. For this purpose the United States is divided into eighty-one districts, each state containing at least one, and the larger states several. To each district there is appointed by the president, with the advice and consent of the Senate, a district judge. There is also appointed a district attorney, or prosecuting officer, with such assistants as may be necessary, who act under the direction of the Attorney-General of the United States. A United States marshal, with such assistant marshals as are necessary, acts as the executive officer of the court, and may call upon the military force of the United States, if necessary, to aid him in the performance of his duties.

Jurisdiction of the District Court

To this District Court is given all the original jurisdiction of the United States, with a few exceptions: cases involving ambassadors and other public ministers and cases to which a state is a party are considered directly by the Supreme Court; also certain classes of special or technical cases are prosecuted in one of the special courts, and suits against the United States for money damages are tried before the Court of Claims, whose award is in the nature of a recommendation to Congress for an appropriation. Thus the District Court has all the criminal jurisdiction arising under the federal laws of Congress, and all cases in admiralty and maritime jurisdiction now extending to all inland waters which in any way may be utilized for interstate commerce. And perhaps even more far-reaching than the above, in the District Court originate all cases to which citizens of different states are parties. Moreover, a suit already begun in the state courts may be transferred to the District Court, if it can be shown that it is one in which the District Court could gain jurisdiction. It is further to be noted that the courts of the United States, and thus the District Court, act not merely as courts of law but as courts of equity, and have power to issue the writ of injunction and to punish for refusal to obey by means of proceedings for contempt of court.

The Circuit Court

By the first judiciary act of 1789 a Circuit Court was established to hear cases of appeal from the District Court and to take cognizance of more important cases than were given to the District Court. The justices of the Supreme Court were assigned to this, and each was required to hold two circuits a year in each district of his circuit, together with another justice of the Supreme Court and the judge of the District Court, which was included in the circuit. The justices complained of this double service, and in 1801 a distinct class of circuit justices was created. This act was repealed in the following year, and the justices of the Supreme Court went on circuit until 1869 when the country was divided into nine circuits, and nine circuit justices were appointed. In 1891 it was found that the Supreme Court was nearly four years behind its docket, and a new court was created to relieve the Supreme Court of its burden of cases. This was called the Circuit Court of Appeals, With the establishment of the Circuit Court of Appeals and the increase of the number of cases which might be brought before the District Court, the importance of the Circuit Court declined. Therefore, by the judiciary act of 1911, the Circuit Court was abolished, and the jurisdiction of the cases which came before it was given to the District Court. Thus the District Court has become the most important court of first instance in the United States, replacing the old Circuit Court.

The Circuit Court abolished, 1911

The Circuit Court of Appeals

The act establishing the Circuit Court of Appeals as amended by the act of 1911 groups the states into nine circuits. For three of these circuits four circuit judges are appointed; for one circuit, two; and for the remaining circuits, three. These circuit judges, together with the justices of the Supreme Court, and the judges of the District Court, which is included in the circuit, form the Circuit Court of Appeals. Any two of the judges may sit — in practice the justices of the Supreme Court never attend — and take cognizance of appeals from the District Court. The court has no original jurisdiction but very wide appellate power. All cases decided by the District Court are reviewable by the Circuit Court of Appeals upon writ of error, except certain classes of cases which are carried directly to the Supreme Court. In addition, it hears appeals in cases of bankruptcy and in injunction proceedings, and appeals from the territorial court of Alaska. More important, however, than its wide appellate jurisdiction is the fact that its judgment is final in a large number of cases. In all cases in which the jurisdiction of the United States courts was obtained on the ground of diverse citizenship, and in cases arising from patent, copyright, or revenue laws, and in all cases in admiralty, except prize cases, the jurisdiction of the Circuit Court of Appeals is final. But the Supreme Court may, upon petition of either party, if it thinks advisable, cause any case in which the judgment of the Circuit Court of Appeals is final to be brought before it, there to be reviewed and determined.

The Supreme Court

The Supreme Court of the United States consists of a chief justice and, at present, eight associate justices. As has been pointed out, the Constitution provides that such a court shall be established, but leaves to Congress the duty of organizing the court and determining the number of justices. Acting upon this power, Congress has at various times increased the number of justices and once, to prevent appointments by Andrew Johnson, enacted that no vacancies should be filled until the number of justices should be reduced to seven. The compensation of the judges has been altered, always, however, by additions, and at present the Chief Justice receives $15,000 and the Associate justices $14,500. The Court always sits at noon in Washington, in the old Senate chamber, and preserves considerable form and dignity.

The jurisdiction of the Supreme Court: (1) Original

The jurisdiction of the Supreme Court is determined partly by the Constitution and partly by statute. Its original jurisdiction is fixed by the Constitution, and includes only two classes of cases, cases in which either ambassadors or states are parties.

(2) Appellate

Its appellate jurisdiction, however, is wide. By the Constitution it covers all cases over which the United States courts could take jurisdiction "with such exceptions and under such regulations as the Congress shall make." Congress has made frequent regulations and exceptions, some of which have been noted, but the appellate jurisdiction is still very wide and of surpassing importance. In general it includes all cases from state courts where a national law or right has not been upheld, or where a state law or right has been supported against the claim of a national one; all cases in which the jurisdiction of the District Court is questioned; all cases where the construction of the Constitution of the United States, or any law or treaty, is involved, or a state constitution or law is claimed to be in contravention of the Constitution of the United States; and all cases where the decision of the Circuit Court of Appeals is not final. In all cases where such judgment is final the Supreme Court may review such decision and pass judgment. In addition, under certain conditions, appeals may be taken from the Court of Customs Appeals and Court of Claims; also from the District Court when sitting as a Prize Court, and from the District Courts of Hawaii, Porto Rico, Alaska, the Philippine Islands, and the District of Columbia in certain cases. Thus the final decision of a constitutional question, the constitutionality of either a state law or a congressional statute, may be appealed and brought before with the trial of cases of rebating, and other actions concerning commerce. All final judgments were made reviewable by the Supreme Court, on appeal, provided such appeal did not act as a stay in the judgment, unless the Supreme Court itself should so direct.

Anticipated advantages of the Commerce Court

The intent was evidently to provide a body possessing peculiar qualifications to deal with the complicated problems of interstate commerce, to insure uniformity of decision, and to obtain a final decree concerning the orders of the Interstate Commerce Commission more quickly than where cases were prosecuted in the regular courts. Against the establishment of the court it was urged that it was contrary to American custom to establish special courts, which might resemble the administrative courts of Europe. It was feared by some that the court would fall under the control of the railroads, while some business men feared radical action by the court. Finally, it was asserted that the creation of five justices was but a means of extending the patronage of the party in power, and was not warranted by the necessities of the courts.

Abolition of Commerce Court

The history of the court was unfortunate. In 1911 the court in a series of decrees overrode the orders of the Interstate Commerce Commission, only to have its own decision reversed by the Supreme Court. In addition, one of the judges was successfully impeached and removed. Moreover, with the change of parties the majority of the House in 1913 attempted to abolish the court by refusing an appropriation for its maintenance. Twice in 1913, President Taft vetoed general appropriation bills because of such action. Finally by act of Congress, December, 1913, the Commerce Court was abolished and the judges were transferred to the Circuit Court of Appeals. Thus, instead of a review of the decisions of the Interstate Commerce Commission by a single central court, appeals are now brought in the various federal courts throughout the country, as was done before the Commerce Court was created. Fear of the establishment of special courts has been removed, and the jealousy of special interests has been satisfied, but final uniformity and the ultimate decision of the cases has been delayed.

THE JURISDICTION OF THE UNITED STATES COURTS[1]

The jurisdiction of the United States courts as originally fixed, and later limited by the Eleventh Amendment, extends to all federal questions. The most important section in the grant of power is in Article VI, by which the Constitution and the laws of the United States are declared to be the supreme law of the land. Given this declaration, the specific grants of jurisdiction naturally follow and in a certain sense are but specific enumerations and explanations of the general grant. Yet there are three important additions which are made by Article III, namely: in all cases to which ambassadors, states, and citizens of different states are parties the jurisdiction is granted to the federal courts. Therefore, as Chief Justice Marshall said, the jurisdiction of the courts may be grouped in two classes:

The jurisdiction of the United States courts as explained by Marshall:

(1) Character of cause

In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." . . .

(2) Character of parties

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between

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[1] This Constitution, and the laws of the United States which shall be made in pursuance thereof . . ., shall be the supreme law of the land. — The Constitution of the United States, Article VI, clause 2

The judicial power shall extend to all cases, in law and equity, (1) arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; (2) to all cases affecting ambassadors, other public ministers, and consuls, (3) to all cases of admiralty and maritime jurisdiction; (4) to controversies to which the United States shall be a party; (5) to controversies between two or more States, (6) between a State and citizens of another State, (7) between citizens of different States, (8) between citizens of the same State claiming lands under grants of different States, (9) and between a State, or the citizens thereof, and foreign states, citizens, or subjects. — Ibid. Article III, Sect. ii, clause 1

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state. — Ibid. Amendment XI

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to [illegible] and fact, with such exceptions and under such regulations as the Congress shall make. — Ibid. Article III, Sect. ii, clause 2

> two or more States, between a State and citizens of another State"; and "between a State . . . and foreign states, citizens, or subjects." If these be the parties, it is unimportant what may be the subject of the controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.[1]

Reading in the exception of the Eleventh Amendment, which rendered a state free from the possibility of suit by a citizen, Marshall's definition holds good to this day.

Character of case: maritime affairs and all cases to which the United States is a party

Those cases depending upon the character of the controversy are most easily understood. The Constitution grants to the courts jurisdiction over cases in maritime affairs and all cases arising under the Constitution or laws of the United States. This grant is the logical enumeration and affirmation of the supremacy of the federal law. Article VI of the Constitution declares the Constitution and laws of the United States to be the supreme law of the land, and judges of the state courts are bound to enforce them; but recognizing the pressure which might be brought to bear upon a state judge, and also to provide a tribunal undisturbed by state influence, the convention of 1787 provided a national judiciary to enforce its own laws. The enforcement of the laws of the United States in the courts of the United States is easily understood; and Congress has by various statutes established inferior courts and determined which court should have jurisdiction over various statutes. For example, the enforcement of most of the federal laws is given to the District Court; but appeals from the appraisers are carried not to the District Court but to the Court of Customs Appeals. All admiralty jurisdiction and all criminal prosecutions provided for by statute are furthermore vested in the District Court.

The United States courts the instrument by which constitutional rights are enforced

But the supremacy of the federal system would not be satisfied by a mere formal enforcement of the federal statutes. The Constitution lays certain restrictions upon the states and guarantees certain rights to individuals. The United States judiciary furnishes an instrument for enforcing these provisions and guarding these rights against state action. Therefore, under certain restrictions, in any case in which a right or privilege is guaranteed by a federal law or by the federal Constitution and is denied by a state court, or in one in which it is claimed that a state law or constitution infringes the federal Constitution or federal law, and such state instrument is upheld by the state court, the cause may be taken to the United States courts.

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[1] *Cohen* v. *Virginia*, 6 Wheat. 264, 378.

The jurisdiction of the United States courts, however, is gained not merely where a constitutional question is the sole point at issue, but if the constitutional question is in any sense a vital or integral part of the proceedings, the decision of the whole case is transferred to the federal courts. Thus Chief Justice Marshall stated the jurisdiction of the court:

If a constitutional question is a vital part of the case, the United States courts may gain jurisdiction

> A cause may depend upon several questions of fact and law. Some of these may depend upon the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. . . . We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give to the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.[1]

Appeals to the United States courts

Thus the courts may gain jurisdiction over any case under a state constitution or law in which a constitutional right is involved; and on appeal may take the consideration of the same, provided the state court has refused to enforce the claim set up under the federal law or Constitution.[2] This vastly enlarges the jurisdiction of the federal courts and gives them judicial review of the acts of state legislatures with the power of declaring unconstitutional and void such acts as, in their opinion, transgress the federal Constitution.

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[1] *Osborn* v. *Bank*, 9 Wheat. 738, 821, 822, 823.

[2] Formerly there was no appeal from the decision of a state court which declared invalid a state statute because of conflict with the Constitution or rights claimed under it. In 1916 an amendment to the Judiciary Act (Statutes of 1916, chap. 448, sect. 237) allows an appeal to the Supreme Court as formerly on a writ of error, and in addition declares that the Supreme Court may " by certiorari

Jurisdiction of the courts wider than the legislative power of Congress

From this point of view the jurisdiction of the courts is far beyond the legislative power of Congress. Congress can legislate only upon specific subjects; these laws the courts enforce. But the courts enforce principles established by the Constitution upon which Congress has no power to pass affirmative legislation. For example, the Fourteenth Amendment declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

In declaring an act of Congress passed to give the negroes equal rights in inns, public places, and conveyances, unconstitutional, the court said:

> It [the Fourteenth Amendment] does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to.

The court illustrated its contention as follows:

Illustrated by the civil rights cases

> The Constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give Congress power to provide laws for the general enforcement of contract; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected; and this power was exercised.[1]

The remedy was in giving the federal courts jurisdiction in cases of appeal from state courts, where a state law was claimed to be an impairment of contract, and the law had been upheld by the courts.

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or otherwise . . . require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution . . . of the United States, and the decision is against their validity. . . ."

[1] *Civil Rights Cases*, 109 U. S. 3, 11, 12.

The courts bring the Constitution to every citizen

Congress, by giving the courts this jurisdiction, enables the courts by their decision of the cases to do what Congress could not accomplish by legislation. In other words Congress cannot correct or prohibit by legislation certain acts within the states. But the courts, in applying the principles of the Constitution, can annul the laws of the state or grant relief from the acts of states or individuals, which are contrary to the principles of the Constitution as interpreted by the courts. Hence it is seen that the field of judicial action is wider than that of congressional legislation, and from their power to interpret and apply the principles of the Constitution, the courts, not Congress, maintain the supremacy of the federal law and apply it to every controversy. Or, to put it more popularly, the courts bring the Constitution to every citizen.

Character of the parties

The second class of controversies over which the courts take jurisdiction depends upon the character of the parties. Briefly, all cases affecting public ministers, states, and citizens of different states, must or may be carried to the United States courts. Cases involving ambassadors have seldom arisen, and since by the Eleventh Amendment no citizen can sue a state, controversies between states or citizens of different states are the chief ones over which the courts have jurisdiction. By far the larger part of these cases arising under this grant come from the diversity of citizenship. All such cases, no matter what the character of the controversy, may be prosecuted in United States courts. It is thus again clear that the United States courts possess a wider field in jurisdiction than Congress does in legislation. In cases of all sorts, involving almost every relation of life, the federal courts have jurisdiction and are called upon to enforce and administer justice according to law. The question at once arises, What law? Congress is limited in its power of legislation and is debarred from passing statutes upon many subjects over which the courts take jurisdiction, and in which the federal courts must have a law to administer. In such cases Congress, by the great Judiciary Act of 1789, enacted that in trials at common law the federal courts should apply, except as otherwise provided, the laws of the several states as rules of decision. By this very statute the power of

Suits between citizens of different states extend the jurisdiction of the courts into a field where Congress cannot legislate

Congress to determine the procedure and to make exceptions, if need be, is recognized; and both Congress and the courts have exercised this power.

Illustrated by admiralty code

One of the most obvious examples of this action is seen in cases of admiralty, that is, in proceeding against a vessel *in rem.* Suits of this sort are given by the Constitution to the United States courts, and Congress under its power to make all laws necessary and proper for the execution of the powers vested in the government has allowed the court to develop a code of admiralty which is universal in its application within all the states. By judicial interpretation and congressional enactment this code has been extended to all waters which in any way may be used for interstate commerce, and thus applies to inland as well as tidal waters. This, of course, makes the application of admiralty quite universal throughout the United States; and this code is not of the states but of the nation. In 1890, summarizing the preceding decisions, the court held as follows:

> It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the law in question. The act of Congress which limits the liability of shipowners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which maritime law extends. . . . As the Constitution extends the judicial power of the United States to "all cases in admiralty and maritime jurisdiction," and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures.[1]

Illustrated by Court of Claims

But it may be said that, by the Constitution, cases in admiralty are expressly given to the United States courts. Can similar action be found in "cases to which the United States is a party . . . and between citizens of different States"? The establishment of the Court of Claims and the passage of the Tucker Act in 1887 are sufficient answers to the question as regards controversies to which the United States is a party. And in suits at equity between citizens of different states the courts do not follow the procedure of the states nor necessarily grant the same reliefs. A national code of equity, common to all the federal courts, has been evolved, quite independent from the laws of the different states. This code, it is to be noted, is not based upon either state or federal law, but consists of rules devised by the Supreme Court itself. Hence the revision of the code in 1912 was not by Congress but by a committee of the court.

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[1] *In re Garnett,* 141 U.S. 1, 12, 14.

Illustrated by the equity code

Common-law suits

Also in common-law suits it is found that Congress and the courts have taken action independently of the laws and decisions of the states. The Judiciary Law of 1789 recognized the power of making exceptions to the procedure of following the decisions and laws of the states, and the courts have made such exception. The most striking example is to be found in the realm of commercial law. In this field the court has said:

In suits involving commercial law the United States courts are not bound by state statutes

> It never has been supposed by us, that the section [of the judiciary act] did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals but in the general principles and doctrines of commercial jurisprudence.[1]

The court therefore held that it would not follow nor be bound by the decision of the court of New York. But the court has gone even further and disregarded the statute of a state which conflicted with the rules of general commercial law. Part of the opinion in this case reads as follows:

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[1] *Swift* v. *Tyson*, 16 Peters, 1, 18, 19

In such cases the United States Courts may render of no avail state statutes which limit the jurisdiction of federal courts

> Whilst it will not be denied that the laws of the several states are of binding authority upon their domestic tribunals, . . . it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant, to whom the right of resort to these courts has been secured by the laws and constitution. . . .
>
> The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing.[1]

Cases in which the courts follow rules of national application

To sum up: in general, the laws of the several states are followed by the United States courts in suits of this sort. But in all cases of equity, and in some cases of commercial law, and in the cases of relation of master and servant, the competency of witnesses, and in several other fields, the court follows not the laws of the state but rules of a national application. In these fields the courts come very near to establishing a federal common law. It is true that the existence of such a common law is generally denied, but its principles are applied, and in one case its existence was admitted by implication. In the case of *Western Union Telegraph Co.* v. *Call Publishing Co.*,[2] it was said:

No "federal common law" but a law in force throughout the United States

> There is no body of Federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no other rules and burdened by no restrictions other than those expressed in the statutes of Congress.

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[1] *Watson* v. *Tarpley*, 18 How 517, 520, 521.

[2] 181 U. S. 92, 101.

It is, therefore, perhaps within the bounds of possibility that these principles may be still further extended, and that for cases between citizens of different states there may develop a system more uniform than that of the laws of the several states. As these cases multiply, these principles of federal decisions may come to have the characteristic of a federal common law, enforced by the courts throughout the states.[1]

THE OPERATION OF THE FEDERAL COURTS

Practice in the federal courts

The practice and procedure in the federal courts is analogous to, yet in many respects different from, that of the courts in the states. This procedure rests partly upon statute and partly upon rules which the courts themselves have established. The technical details of such procedure are of importance chiefly to the bar and need not be explained, but in general it may be said that it is more expensive to prosecute suits in the United States courts than in the courts of the states. Yet in spite of this expense the federal courts are often invoked in suits over which state courts have concurrent jurisdiction, on account of the higher respect in which the judges are held. This, of course, varies in different states, but, taking the United States as a whole, the federal judges rank above those of the states in ability and learning. Moreover, cases in which a constitutional question is involved reach their final decision more readily through the federal courts than if initiated in the courts of the states.

Distinction between "law" and "equity"

The courts of the United States administer both law and equity. By "law" is meant that system of rules that has grown out of the old English common or customary law, added to or modified by English statutes passed before 1776 and by American statutes. By "equity" is meant the system of rules originated by the King's Chancellor and the Court of Chancery to supplement the English common law which had very early become too rigid. Equity concerns itself with rights and remedies not sufficiently taken care of by the common law. Equity, like the common law, has been much added to and modified by statute. These two systems of law, both now partly written and partly unwritten, are usually administered by the same court sitting as a court of law or a court of equity, according to the case before it. In a case in equity, or a chancery suit as it is usually called, all the proceedings, the evidence, and the arguments are in writing; there is no jury and the judge decides the case. In cases appealed to the United States Supreme Court, oral arguments, in addition to the written arguments, may be presented.[1] Suits at law terminate in judgments. Suits in equity result in decrees which may be positive commands to do or refrain from doing something. For example, a suit at law may award money damages for the failure to perform a contract. These damages may or may not be collected according to the financial responsibility of the defendant. A suit in equity, however, may result in a decree of the court to perform the contract under the penalty of imprisonment for failure to obey the decree of the court, an offense known as contempt of court.

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[1] See W. W. Willoughby, The Constitutional Law of the United States, p. 1039

Procedure in a federal court when sitting as a "court of law"

When sitting as a court of law of first instance the courts try cases before a jury, taking testimony of witnesses and listening to the arguments of counsel. The judge then explains the law — federal, state, or common — to the jury, adding any special instructions requested by the counsel and approved by the judge. The jury, after deliberation, brings in the verdict, which in most states, and in all United States courts, must be the unanimous decision of the twelve jurymen. This verdict, however, the judge may set aside as contrary to the law or the evidence. But if this is done, the judge must order a new trial. Federal judges, more frequently than judges of state courts, take cases from the hands of the jury and decide them from the bench. The judge, moreover, may hear motions, grant requests, and issue writs.

The writ of habeas corpus

The writ of habeas corpus is the most important of these. By this writ the prisoner is brought before the court for the purpose of determining the cause of his imprisonment. The guilt or innocence is not determined, but the reason and legality for the prisoner's arrest and detention must be proved or he may be released. The federal courts can only use this writ in federal cases. The writ cannot be sought from a federal judge for the purpose of questioning the action of state authorities acting in a case involving merely state law. It must be clear that the federal constitution or federal law is concerned. But it is to be noted that the federal authority may be invoked in four instances.[1] In such cases the judges to whom Congress has given the power to issue the writ may compel the authorities, state or federal, to bring the prisoner before them to have the cause for detention passed upon.

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[1] See "Law, Common" and "Equity," in the Cyclopedia of American Government.

The writ of mandamus

Another writ which the United States courts may issue is the writ of mandamus. This, like the writ of habeas corpus, is a common-law writ and is issued to compel some corporation, official, or lower court to do something. The use of this writ is determined by statute, and it must be made clear that there exists a legal right to have the things done, that a demand has been made and performance refused, and that there is no other adequate remedy. In the use of this writ against officials Marshall, in *Marbury* v. *Madison*, determined for all time the distinction between executive and ministerial acts; the former, requiring discretion, are not subject to such action, while the latter, requiring no discretion but being performed merely in accordance with the directions of statutes, are clearly subject to this writ.

The writ of injunction

When sitting as a court of equity the United States courts apply a code established by the court and have the power to issue certain writs especially provided for and others "which may be necessary to the exercise of their respective jurisdiction and agreeable to the usages and principles of law." The most important writ in equity procedure is that of injunction. This, it is to be noted, is a writ issued in equity, and disobedience constitutes contempt of court, punishable at the discretion of the court. This writ is issued for many purposes. It may direct that a certain condition be maintained by performing certain acts. For example, it may order a person to refrain from doing something either temporarily or permanently.[1] A railroad may be enjoined from laying its tracks until the rights of its franchise be determined, and if it be found that no such rights exist, the injunction may be made permanent. Because the fact that great corporations like railroads operate in many states, the federal courts obtain jurisdiction over them on the ground of diverse citizenship, and the railroads have frequently invoked the writ of injunction in dealing with their employees in labor troubles.

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[1] In the case of (1) a prisoner detained under federal authority; (2) a prisoner detained for some act done or omitted in pursuance of federal authority; (3) a prisoner held in violation of the Constitution or laws of the United States; (4) a citizen of a foreign country claiming to be imprisoned for some action done in accord with the sanction of his government.

Appeals

The federal courts, however, have appellate as well as original jurisdiction. From the lower United States courts cases may be transferred to the higher, according to the rules passed by Congress. Thus cases from the District Courts may be carried to the Circuit Court of Appeals or, under certain conditions, directly to the Supreme Court. In like manner cases may be taken from the Circuit Court to the Supreme Court. In general, the process is by writ of error; that is, it is asserted that the lower court has made an error in law in determining the case. In certain other cases the Supreme Court may, by a writ known as certiorari, transfer the consideration of the case from a lower court to itself for review and determination. Once within the jurisdiction of the Supreme Court it may reverse, modify, or affirm the judgment of the lower court and may at its discretion award execution or remand the same back to the lower court for award in accordance with instructions.

Procedure in the Supreme Court

These instructions and the decision of the Supreme Court are given after the case has been presented by printed briefs which contain the arguments of the counsel, by the printed record of the case in the lower courts, and by oral arguments. The printed portions of the testimony and the brief are often very voluminous; in one instance occupying over twenty-three volumes of twelve thousand closely printed pages. During the oral argument of the counsel the justices frequently ask questions or make comments. After each case has been publicly presented each of the justices masters the printed record and arguments,

Briefs

Argument

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[1] See *Gompers* v. *Bucks Stove and Range Co.*, 215 U.S 418, for the use of an injunction against a boycott. This opinion contains an interesting discussion of contempt procedure. See also *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, for a discussion of the use of injunction against unionizing a mine.

Discussion

and the court then meets in private and discusses the case, each justice, beginning with the senior, giving his opinion in turn. If agreement is reached, the Chief Justice appoints one of the justices to write the decision of the court; but if it is impossible to reach unanimity, one or more justices may express their dissent in one or in several dissenting opinions. In one of the *Insular Cases*, *Downes* v. *Bidwell*,[1] the judgment of the court was expressed in three separate opinions: one by Justice Brown; one by Justice White, with whom Justices Shiras and McKenna concurred, agreeing in the conclusion of Justice Brown but on different grounds; and an opinion of Justice Gray, stating certain additional propositions. The minority of the court, which included the Chief Justice and Justices Harlan, Brewer, and Peckham, dissented, Justice Harlan filing an additional opinion. From the above it will be seen that there was no majority which followed the same process of reasoning, but that a majority of one reached the same conclusion by different methods of thought and application.

Dissenting opinions

Distinction between the judgment and the opinion of the court

It is therefore very necessary to bear in mind the difference between the judgment of the court and the opinion in which that judgment is expressed. The judgment of the court in a case is always the judgment of the majority, and is usually expressed in a brief sentence, affirming, reversing the judgment of the lower court, or remanding the case for retrial in accordance with instructions, or granting or denying the petition for relief asked. This judgment is the sole legal decision of the court in any particular case; but the court generally discusses the case, showing the method of thought pursued in reaching the conclusion stated in the judgment. This is the opinion. It is not a part of the legal judgment, but it indicates the attitude of the court not merely upon the case under consideration but sets forth the principles controlling the case in hand, and in other similar cases. That part of the opinion which deals with the decision of the case under review is accepted as the position of the court and is regarded as a declaration of the court as to what will be held to be the law in subsequent similar cases. Frequently, however, opinions of the court go outside of the

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[1] 182 U. S. 244.

Obiter dicta

case under consideration and lay down principles — obiter dicta — which have little application to the actual decision of the particular case but are indicative of the point of view of the court. Thus Marshall, in *Marbury* v. *Madison*, expressed the judgment of the court in these words, "The rule must be discharged." The reasoning upon which the judgment was based set forth the power of the Supreme Court to declare an act of Congress unconstitutional, while as a series of obiter dicta the court made the distinction between executive and ministerial acts of officials, a distinction which has ever since been followed. The most notorious case was found in the Dred Scott case, where the judgment of the court was that the decision of the lower court be reversed and the case dismissed for want of jurisdiction; but in his opinion Chief Justice Taney attempted to settle the question of slavery in the territories by a series of obiter dicta which did much to hasten the Civil War.

Dissenting opinions furnish ground for criticism of judgment

Although the majority opinion is always effective, yet the dissenting opinions frequently find such strong supporters that the action of the court is brought into politics. Particularly is this true when one political party passes acts to alter the existing social or economic system, and these statutes are held unconstitutional by a bare majority of the court. Thus, in the Income Tax case[1] the case was at first heard and decided by a divided court in which the full number of justices was not present. At the rehearing one of the justices altered his views, and the law was held unconstitutional by a vote of five to four. This gave great offense to many of the Democratic party, which was voiced by Mr. Bryan when he said: "The income tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind."

Criticism of opinions and judgments of court

Not only may the decision of the court be brought into politics and its motives criticized, but a genuine doubt may arise as to what the law actually is. The decision of a particular case is evident, but so different and contradictory views may be held by the majority that the underlying principles applicable to similar cases may be by no means clear. Where the court is divided the law is uncertain, and confusion results. Again, if four justices agree in their interpretation and reasoning that the majority of the court is wrong, many excuses may be found for lay criticism. "If you want criticism," said Mr. Bryan, "read the dissenting opinions of the court." The influence of the court is not strengthened if critics can find in the dissenting opinions arguments better than they can frame, directly contrary to what is declared to be the law, and which furnish arguments for the support of what the court has declared the law is not. Law which depends for its validity upon the opinion of one justice may seem less sacred than the desires of thousands expressed by their representatives in the legislature. Fortunately, however, in recent years four to five decisions have been less frequent, and there seems to be an attempt to reach a common ground of decision. This increasing unanimity has not only strengthened the influence of the court but has greatly increased the respect for law.

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[1] *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429; 158 U. S. 601.

CHAPTER XVI

THE JUDICIAL SYSTEM OF THE UNITED STATES
(CONTINUED)

THE SUPREME COURT AND LEGISLATION

Parliament sovereign in England, hence its acts are constitutional. Congress not sovereign in the United States; hence its acts are subject to judicial review

". . . There is no court that has power to defeat the intent of the legislature, when couched in such evident and express words as to leave no doubt whether it was the intent of the legislature or no."[1] Nevertheless, the Supreme Court has declared nearly three hundred statutes unconstitutional. In thus negativing the will of the representatives the court has been accused of judicial usurpation. But the British constitution differs from the Constitution of the United States. The British constitution is of a flexible type, largely unwritten; in it Parliament is sovereign, and every act of Parliament is *ipso facto* legal and constitutional. On the other hand, the Constitution of the United States is rigid, written in form, and Congress not being sovereign can legislate only upon those subjects delegated to it by the Constitution. The Constitution is at once a delegation of authority and a limit to the use of that authority.

Result of precedent, design, and acquiescence

As has been shown, the colonists and the people of the states were accustomed to this idea of written constitutions. Moreover, both colonial and state legislatures had seen the courts negative their acts and enforce the principles of the charters or state constitutions in opposition to their own statutes. Therefore, considering the declared supremacy of the Constitution and federal law, it might be argued *a priori* that the framers of the Constitution of 1789 intended to give the courts the power of judicial review to which the people were more or less accustomed. Whether such was their intent or not, two things have happened: First, the courts with unanswerable logic have demonstrated their power to declare acts of the state and national legislature unconstitutional when they conflicted with the federal constitution. Second, this power, while at first bitterly attacked, was in time acquiesced in, except on certain critical occasions, but recently it has been made the basis of most revolutionary proposals for amending the Constitution and has been once again denominated judicial usurpation.

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[1] Blackstone, Commentaries, Vol. I, p 91.

Judicial review not objected to in convention of 1787

Professor Beard[1] has shown that some of the more prominent members of the convention of 1787 held on various occasions that this power of judicial review might be exercised, and the judicial article of the Constitution was adopted without serious objection, although it was known to be susceptible of such an interpretation. Professor McLaughlin,[2] discussing the political theory and practice from the time of the Revolution, says:

> The chiefest among the principles I have given are these: first and foremost, the separation of the powers of government and the independence of the judiciary, which led courts to believe that they were not bound in their interpretation of the Constitution by the decisions of a collateral branch of the government; second, the prevalent and deeply cherished conviction that governments must be checked and limited in order that individual liberty might be protected and property preserved; third, that there was a fundamental law in all free states and that freedom and God-given right depended on the maintenance and preservation of that law . . . ; fourth, the firm belief in the existence of natural rights superior to all governmental authority, and in the principles of natural justice constituting legal limitations upon governmental activity. . . . Back of all these ideas was a long course of English development in which the judges had played a significant part in constitutional controversy.

From judicial precedent, moreover, it is easily demonstrated that the Supreme Court exercised this power almost from its organization. The first indication of the attitude of the court is found in 1790 in *Hayburn's Case*.[3] This arose from the fact that Congress had provided that the federal judges should act as examining magistrates in regard to military pensions, and that their decisions should be subject to review by the Secretary of War. The constitutionality of the statute was never formally passed upon, but all of the justices of the Supreme Court when on circuit expressed their opinions, and Congress repealed the act. The earliest case in which a statute of Congress was considered by the court was in 1796.[1] In this case the court upheld the statute laying a direct tax upon carriages. Although the statute was upheld, yet the reason for bringing the suit was the assumption that the court had the power to pass upon the constitutionality of an act of Congress. In 1803, in *Marbury* v. *Madison*, Marshall stated the theory so clearly and logically that, as far as the court has been concerned, it has never since been questioned. His reasoning on this point was as follows:

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[1] C. A. Beard, The Supreme Court and the Constitution, chap. ii.

[2] A. C. McLaughlin, The Courts, the Constitution, and the Parties, pp. 105, 106.

[3] 2 Dall. 409.

Marshall's opinion in *Marbury* v. *Madison*

Act of Congress not warranted by the Constitution

> The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

Can an act of Congress repugnant to the Constitution be law?

> The question, whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. . . .

Powers of Congress defined by the Constitution

> . . . The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Constitution is thus supreme or on a level with acts of Congress

> Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. . . .

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[1] *Hylton* v. *United States*, 3 Dall. 171.

Court must decide which of two conflicting laws it will enforce

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Court must decide cases conformably to the Constitution

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Constitution, not acts of Congress, governs case

If then the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that the courts must close their eyes on the Constitution and see only the law.

To overlook the Constitution would subvert idea of supremacy of the Constitution and make Congress supreme

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is really effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. . . .

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. . . .

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

Constitution a rule for courts

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that

> instrument as a rule for the government of the *courts*, as well as of the legislature. . . .
>
> **The Constitution the supreme law of the land**
>
> It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *Constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution, have that rank.
>
> Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that the *courts*, as well as other departments, are bound by that instrument.[1]

The power to declare the act of a state unconstitutional was first exercised in 1795, in *Vanhorne's Lessee* v. *Dorrance*,[2] where the court used words which might have been the precedents for Marshall's more elaborate reasoning:

Justice Paterson on the supremacy of the Constitution

> What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land, . . . and can be revoked or altered only by the authority that made it. . . . What are the Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature.

But this act conflicted with a treaty not with a constitutional rule. The earliest cases in which a state statute was declared unconstitutional were those of *United States* v. *Peters*,[3] in 1809, and *Fletcher* v. *Peck*,[4] in 1810. In both these cases Marshall upheld the supremacy of the Constitution, although pointing out the delicate position of the court in annulling the act of a state. Nationalist that he was, Marshall apparently had more respect for the act of a state than for the coordinate branch of the government.

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[1] 1 Cranch, 137, 176, 177, 178, 179, 180.

[2] 2 Dall. 304, 308.

[3] 5 Cranch, 115.

[4] 6 Cranch, 87.

Analysis of action of court

Up to 1911 the Supreme Court, acting upon this power, considered 1183 cases in which the constitutionality of a federal or state statute was questioned.[1] Of these, 904 have been upheld and 279 have been declared unconstitutional. In 218 cases federal acts have been under consideration and in 185 cases the statute has been upheld, while in only 33 cases have the laws been declared unconstitutional, or in nearly 85 per cent of the cases the statute has been affirmed. Of the 965 cases in which state statutes or municipal ordinances were brought before the court, 719 were upheld and 246 declared void, or in all more than 74 per cent of the cases the act of the states have been upheld.[2]

In view of these numerous precedents and comparatively small percentage of statutes disallowed, it is somewhat surprising to find a recrudescence of the criticism that the courts are thwarting the will of the people and are usurping the functions of the legislatures. Several reasons typical of modern tendencies may be found to explain this attitude.

KINDS OF STATUTES ANNULLED

Employers' liability

In some of the decisions the court has attempted to set aside statutes passed by Congress in the attempt to remedy industrial and social conditions. In 1906 Congress attempted to give to employees in interstate commerce surer remedies for the injuries they might suffer. In so doing the act repealed the old common-law rules of fellow servant, that is, that an employer was not liable for an injury to an employee caused by the negligence of a fellow employee, and also the rule of contributory negligence, which prevented an employee from recovering damages for an injury caused in part by his own carelessness.[3] Five of the justices held that this act was unconstitutional on the ground that it extended to more than interstate commerce; and three of the five held that Congress had no power to regulate the relations between an employer and his employees. This decision prevented temporarily, at least, an attempt to ameliorate the hardships of an old common-law doctrine which seemed to Congress unsuitable to modern conditions. It is true that Congress repassed the statute making it applicable only to those engaged in interstate commerce, and in such form it was upheld by the court.[1] But popular criticism did not forget the reasoning and attitude displayed by the court in the first case.

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[1] See an exhaustive monograph by B. F. Moore, The Supreme Court and Unconstitutional Legislation, 1913

[2] Ibid. pp. 139–141.

[3] *Employers' Liability Cases*, 207 U. S. 463.

Labor unions

In 1898 Congress passed an act dealing with the labor difficulties on interstate railroads and carriers, providing for arbitration and making it an offense to prevent the employees from joining or remaining in labor unions. This was held unconstitutional because there was no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. And, furthermore, the act was held unconstitutional because it contravened the Fifth Amendment, which provides that no person shall be deprived of his life, liberty, or property without due process of law. Justice Harlan amplified this point in these words:

Opinion of Justice Harlan

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can justify in a free land.[2]

Limitation of hours of labor

An instance of a state statute which was declared unconstitutional may be given. In 1897 New York attempted to limit the number of hours at which bakers might be employed to not more than sixty hours a week or ten hours a day. In declaring this act unconstitutional the court said:

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[1] *Second Employers' Liability Case*, 223 U. S. 1.

[2] *Adair* v. *United States*, 208 U. S. 161, 174, 175.

Lockner* v. *New York

> The general right to make a contract in relation to his business is a part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. These powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions as the Fourteenth Amendment was not designed to interfere. . . .
>
> We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.[1]

Coppage* v. *Kansas

In 1915 the court declared unconstitutional a law of Kansas which, following the lines of a federal statute also declared unconstitutional, made it a crime for an employer to discharge an employee because of membership in a labor union.[2]

These cases are typical of a very small number of decisions which aroused criticism. In fairness it should be said that they are almost the only ones to arouse such feeling; but it is argued that Congress, or a state legislature representing the people, is better able than the court to decide how the changed industrial, economic, and social conditions should be met.

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[1] *Lockner* v. *New York*, 198 U.S 45, 53, 58. But see *Bunting* v *Oregon* (1916), 243 U.S. 426, where a statute of Oregon was upheld which limited the hours at which persons might be employed in mills, factories, or manufacturing establishments to ten, but allowed not more than three hours of overtime in any one day, provided it was paid for at the rate of time and a half.

[2] *Coppage* v. *Kansas*, 236 U.S. 1.

THE NATURE OF REASONING APPLIED BY THE COURT

In the second place criticism is aroused by the kind of reasoning the court follows to determine cases of this sort. In two of the above cases "due process of law" was involved. Due process of law has never been exhaustively defined, yet the words of Webster in the Dartmouth College case, in which he described due process of law or the law of the land, are frequently quoted with approval by the court:

Webster's definition of the law of the land or due process of law

> By the law of the land is most clearly intended the general law; a law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for the courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country.

Popular criticism of the court's application of the due process clause

To the lay mind these words may seem to mean that the courts may test any statute by their own ideas of inherent justice under the guise of determining whether it is within "due process of law." In the application of this principle the judges, who are drawn from one particular class, gain the power to enforce their ideas of justice for those of the representatives of the people. As in the New York bakers' cases the idea of what was held necessary for the health of the people by the legislature was disregarded by the court, and the ideas of what the court held proper for the people were enforced. It has been over the judicial interpretation and application of the words "contract" and "due process of law" which the criticism of the courts has most frequently arisen.

STATUTES DECLARED UNCONSTITUTIONAL BY A BARE MAJORITY

Five-to-four decisions

Many of the decisions which aroused the greatest opposition have been rendered by a bare majority of the court. The income tax was declared unconstitutional by a vote of five to four, so was the first Employers' Liability Act and the Child Labor Law in 1918, and others might be mentioned. In the early decisions, where the court claimed the power to declare a statute unconstitutional, the court said it would "never resort to that authority but in a clear and urgent case."[1] And Justice Story said ". . . a presumption never ought to be indulged, that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."[2] It can hardly be argued that the statute is clearly void and its language altogether unambiguously unconstitutional, when to four justices it would seem constitutional and to be within the power allowed. When the fate of a law, passed perhaps to remedy some widely recognized wrong, depends upon the ideas which one may have concerning the inherent justice of the case, the critics seize it as an example of usurpation by a "judicial oligarchy."

VIGOR OF DISSENTING OPINIONS

In these cases of divided decisions the minority of the court have expressed themselves with such ability that their words furnish the most telling criticism of the decision of the majority. In regard to the interpretation of the words "liberty" and "due process of law," Justice Holmes thus expressed himself in opposition to the majority:

Justice Holmes's dissent in *Lochner* v. *New York*

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in

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[1] *Calder* v. *Bull*, 3 Dall. 386, 399.

[2] *United States* v. *Coombs*, 12 Peters, 72, 76.

> law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of hours of work.[1]

In his dissenting opinion to the Income Tax case, Justice Harlan certainly furnished good argument for agitations for a reconsideration or constitutional amendment:

Justice Harlan on the Income Tax

> But the serious aspect of the present decision is that by a new interpretation of the Constitution, it so ties the hands of the legislative branch of the government, that without an amendment of that instrument, or unless this court, at some future time, should return to the old theory of the Constitution, Congress cannot subject to taxation — however great the needs or pressing the necessities of the government — either the invested personal property of the country, bonds, stocks, and investment of all kinds, or the income arising from the renting of real estate, or from the yield of personal property, except by a grossly unequal and unjust rule of apportionment among the states. . . . I cannot assent to an interpretation of the Constitution that impairs and cripples the just powers of the National Government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.[2]

Few critics have been able to state more forcibly the charge that the court was legislating, under the pretense of interpretation, than Justice Harlan in the Tobacco Trust case, who said:

> . . . But now the court, in accordance with what it denominates the "rule of reason" in effect inserts in the act the word "undue,"

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[1] *Lockner* v. *New York*, 198 U S. 45, 75, 76.

[2] *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U.S. 601, 685.

Justice Harlan on "judicial legislation"

which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say, and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation in effect, amends an act of Congress relating to a subject over which that department of the government has exclusive cognizance.[1]

The court the best interpreter of the Constitution

In view of the vigor of these dissenting opinions given by a member of the court, it is not surprising that the public whose intent has been thwarted by the decision feels that their act is not clearly unconstitutional and is restive under the power of the court to overturn their expressed will. And yet under a fixed and written constitution it is difficult to see where the power to preserve and apply the principles of the Constitution could better be placed. If given to either the executive or legislative branch, the supremacy of the Constitution would become the supremacy of one of those departments. The court is the least moved of any of the departments of the government by the violent partisan conflicts of the day. The judges holding office for life fear no party revolution. The responsibility of their position, the knowledge that their decisions may lead to grave consequences, — to war as did the Dred Scott decision, or to a constitutional amendment as did the Income Tax decision, — leads them to weigh their words carefully. The fact that their exposition of the Constitution becomes a precedent and is to a large measure the rule followed by their successors makes them slow to alter the existing conditions.

The court responsive to public opinion

Nevertheless, the court always has been and is responsive to public opinion. The judges are men of their generation — although, it must be admitted, from their age often holding opinions of a former generation, and from their tenure of office able to enforce these opinions upon succeeding generations — yet they are subject to the theories of the age in which they live, and cannot defy long the sober and thoughtful opinion of their contemporaries. Thus the Supreme Court has at various epochs altered its tone and reflected the spirit of the times. Down to

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[1] *United States* v. *American Tobacco Co.*, 221 U. S. 106

Nevertheless, the court gave judgment against the state on the ground of default; and the matter became one for political agitation, and the Eleventh Amendment was the result. This reversed the decision of the court and declared that a state should not be subject to suit by a citizen.

Income Tax case, 1895

In 1895 the Supreme Court declared the Income Tax passed by the Democratic Congress in the previous year unconstitutional — an apparent reversal of a previous decision. It must be confessed that in giving the opinion the language of Chief Justice Fuller was not dispassionate when he said:

> The present assault upon capital is but beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. . . . If the purely arbitrary limitation of $4000 in the present law can be sustained, none having less than that amount of income being assessed, or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a Board of "Walking Delegates" may deem necessary.[1]

Neither did the vigorous dissenting opinion of Harlan, which has been quoted, tend to keep the subject within the realm of judicial consideration. Nor was the Democratic party slow to take up the challenge, for in its platform of 1896 after denouncing the decision it continued:

Decision denounced in Democratic platform, 1896

> We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expenses of the government.[2]

This sentiment has recurred in varying forms in every platform ever since. Finally in 1913 the controversy was settled by the adoption of the Sixteenth Amendment, declaring that Congress could levy a tax upon incomes from whatever source derived.

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[1] *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 607.

[2] Edward Stanwood, A History of the Presidency, p. 544.

The Dred Scott case

In like manner, when in 1857 Chief Justice Taney attempted to settle the question of slavery in the Dred Scott case, and really opened up the territories to slavery, the court was drawn into politics. The Democrats who assembled at Charleston in 1860 adopted a platform which declared:

Approved in Democratic platform, 1860

> Inasmuch as differences of opinion exist in the Democratic party as to the nature and extent of the powers of a territorial legislature, and as to the powers and duties of Congress, under the Constitution of the United States, over the institution of slavery within the Territories, —
>
> *Resolved*, "That the Democratic party will abide by the decisions of the Supreme Court of the United States on the questions of constitutional law.[1]

The Republican party, however, at Chicago, in the seventh resolution of its platform, directly attacked the decision of the court in these words:

Denounced in Republican platform, 1860

> That the new dogma that the Constitution of its own force, carries slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country[2]

Whether the war was fought to abolish slavery or to preserve the Union, it resulted in the passage of the Thirteenth Amendment, which recalled the obiter dictum by which the court in the Dred Scott case had attempted to settle the dispute.

Attack upon injunctions in Democratic platform, 1896

The Democratic platform of 1896 attacked the power of the courts in another way. As has been pointed out, corporations, particularly railroads, from their operations in various states, are able to take their cases into the courts of the United States, and have invoked relief in equity in the conflicts with their employees. Such was the case in 1894, when in the Pullman strike at Chicago an injunction was issued ordering the employees not to interfere with the transmission of the mails or interstate commerce in any form. The leaders of the strike were arrested, fined, and imprisoned for contempt of court because they disobeyed the injunction. This was attacked in the Democratic platform of 1896, which demanded a trial by jury for all persons arrested for indirect contempt of court; and denounced the process under the term of "government by injunction." This has been repeated in almost every platform since that date. To conciliate the large labor vote the Republicans at length made some concessions for they admitted that "rules of procedure in federal courts with respect to the issuance of the writ of injunction should be more accurately defined by statute," and President Taft, in his message of 1909, urged that some congressional action should be taken to carry out this pledge.

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[1] Edward Stanwood, A History of the Presidency, p. 283.

[2] Ibid. p. 292.

Power of courts to declare statutes unconstitutional attacked

Not only have specific decisions of the court been made subjects of political controversy, but in recent years, as in the early years of the Constitution, the power of the courts to declare a statute unconstitutional has been specifically attacked. The method of the attack is a twofold one, aimed alike against individual judges and the decisions of the court.

(1) Recall of judges

By the recall of judges, any judge, upon presentation of a petition signed by the requisite number of voters, may be removed from office. A new election is held, at which the judge against whom the petition was directed may or may not be a candidate. If he is a candidate and is reelected he continues to exercise his functions. Should he be defeated, however, he is held to be recalled from his office. This device has already been adopted in several states. A proposal for a constitutional amendment was introduced April 7, 1913, by Congressman Lafferty,[1] which provided for the election of all federal judges by a vote of the people, for twelve-year terms, and provided for a recall of all judges, both of the Supreme Court and inferior courts, at any general election at which presidential electors should be chosen. There is little possibility that such a revolutionary amendment will ever be adopted in the near future, but it shows the jealousy and hostility with which the judiciary is regarded in some quarters. Furthermore, it is but an attempt to establish for the federal judiciary the principle of election, which is practiced in an overwhelming number of states, and the recall of judges, which is in vogue in few.

(2) Recall of judicial decisions

The second revolutionary attack by a political party is known as the recall of judicial decisions. This, as regards state courts, was indorsed by Theodore Roosevelt and the Progressive party in its platform of 1912, which declared:

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[1] House Joint Resolution 26, 63d Cong., 1st Sess.

> That when an act passed under the police power of the states is held unconstitutional under the state constitution by the courts, the people, after an ample interval for deliberation, shall have opportunity to vote on the question whether they desire the act to become law notwithstanding such decision.

In dealing with state constitutions this seems to be but a short method of amending the constitution. But there has been at least one attempt to apply it to the federal Constitution. In December, 1912,[1] Senator Bristow in a resolution proposed an amendment to the Constitution, providing that any decision of the federal Supreme Court declaring unconstitutional an act of Congress may be submitted to the electors, and that by a vote of a majority of the congressional districts and of the states such act should, notwithstanding the decision of the Supreme Court, become a law. This likewise seems but a rough-and-ready method of surmounting the difficulties of amending the Constitution; but like the resolution of the Progressive party it has serious objections. A recall of a decision declares but a single law constitutional, despite such a decision. A constitutional amendment establishes a principle under which many laws may be passed. To illustrate, had Senator Bristow's scheme been successfully invoked in 1895, the income tax act of 1894 might have been declared law, but only that particular law; and neither the corporation tax of 1910 nor the graduated income tax of 1913 would have been clearly within the Constitution. But since Senator Bristow's proposal the Constitution has been amended in the orderly and regular method, after long consideration and agitation it is true, and not only the particular tax upon particular incomes mentioned in the act of 1894, but a tax upon "all incomes from whatever source derived" is constitutional. Decisions of constitutional questions tend to become political issues, and the inevitable problem arises whether it is best for the United States to continue under a rigid Constitution, difficult and slow of change, or under the flexible type of England and the European countries.

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[1] Senate Resolution 142, 62d Cong., 3d Sess.

IAPTER XVII

THE WAR POWERS OF CONGRESS

Constitutional grants for military power

The experiences of the Revolution had shown the necessity of giving the central government adequate power in time of war. In the Constitution this grant of power is found in Article I, Sect. viii, and, arranged in logical sequence, gives Congress the following powers: (1) the right to raise and support an army and navy; (2) the right to make rules and regulations for the government of the same; (3) the right to provide for the organizing, arming, and disciplining of the militia of the states; (4) the right to utilize this militia to execute the laws, suppress insurrections, and repel invasions; (5) the right to declare war and make rules for captures on land and sea; (6) the right to make all laws necessary and proper to carry into effect these powers. Article I, Sect. x, clauses 1 and 3, prohibits the states from exercising their military power in a way to hamper the federal government; while the Second Amendment recognizes the necessity of a militia and forbids Congress to pass laws prohibiting the right to bear arms. It is also necessary to remember that Congress in the prosecution of war may exercise to the full all the general powers granted to it, among which are the powers to levy taxes, borrow money, or coin the same, as well as those granted by the clause just quoted, which gives Congress the power to pass all laws necessary for the prosecution of the war.

Why the government has not become militaristic

With these grants Congress has almost unlimited power, undivided with the states, and Congress must meet and bear the responsibility. Enough power is granted to make the United States the most militaristic nation in the world. But the traditions of the country have been absolutely against such a development. Hatred of standing armies alike characterized the Puritans of New England, the Dutch and Quakers of the middle colonies, and the Cavaliers of Virginia; and many of the early immigrants came to escape the burdens so imposed. Reliance upon a citizen militia, as an Anglo-Saxon institution, was firmly rooted in the original colonists and quickly adopted by the immigrants. Consequently the regularly organized standing army of the United States, while excellent in character, has been pitifully small and inadequate for a country so large.

THE ARMY

The regular army

Acting upon the constitutional grant, the first Congress, on September 29, 1789, took over the troops which had been raised under a resolution of the Congress of the Confederation. In 1790 was passed the first army organization act, which provided for a regular standing army, officers and men, not to exceed 1216.[1] Since that time there have been frequent reorganizations; the most important in recent times being in 1901, 1916, and 1917. The reorganization of 1901 was made under the administration of Secretary Root, and provided for a definite number of regiments for each service and a fixed number of officers. The number of privates was left to be fixed by executive order and congressional appropriation, at a number between 60,000 and 100,000. Thus there always existed a skeleton organization of an army of 100,000, while the actual number varied from about 60,000 to 80,000. In addition Secretary Root organized the General Staff, which was expected to secure the coordination of the various branches of the service.[2]

Army legislation, 1916

In 1916, owing to the outbreak of the war in Europe and the consequent agitation for "preparedness" in this country, a great increase in the standing army was demanded. Proposals of all kinds were submitted to Congress, which in the main looked towards three lines of increase: a larger standing army; a very large force of volunteers known as the "Continental Army," part of which was to be kept in active service and part in reserve; and the "federalization of the militia." The Secretary of War, L. M. Garrison, favored the first and second of these plans, but encountering the opposition of Mr. Hay, chairman of the House Committee on Military Affairs, and failing to secure the support of the president, he resigned. The House then prepared a bill which, as far as the regular army was concerned, provided for a force of about 143,000, and adopted the plan for the further federalization of the militia. The Senate increased the number of the regular army to 178,000 and adopted the Garrison plan for a continental army, and agreed, with some modifications, to the House plan for a federalized militia. In conference, the federal volunteer force, or the continental army, was dropped, but the Senate succeeded in fixing the size of the army at 175,000, while the plan for the federalization of the National Guard was retained.

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[1] U. S. Stat. at Large, Vol. I, p. 119.

[2] See Chapter X.

Constitutional limitations upon appropriations for the army

It should be remembered that this plan is subject not merely to legislation by future Congresses but to a constitutional limitation as well. Fear of standing armies was so strong in 1787 that Congress was forbidden to make any appropriation for the support of the army for a period longer than two years. Hence, although a future Congress might repeal this legislation, every subsequent Congress must take affirmative action in order to continue the system. It is thus impossible for Congress to adopt a program for more than two years for the army, although this may be done in the case of the navy.

THE MILITIA

Constitutional grants

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of United States." [1]

"A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." [2]

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." [3]

Main security the militia

These clauses show the importance which the framers of the Constitution attached to the militia. Standing armies were contrary to their habits, and even the hard experience of the Revolution had not weaned them from their belief that the militia should be the main security of a free state. This idea not only found expression in the Constitution but was developed in legislation as well. The regular establishment called for but 1200 men, consequently it was evident that Congress was to depend upon the militia for the performance of the greater part of the military duties. Nevertheless no law was passed until 1792 for the arming and disciplining of the militia.[1]

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[1] The Constitution of the United States, Article I, Sect. viii, clause 16.

[2] Ibid, Amendment II.

[3] Ibid., Article I, Sect. viii, clause 15.

The militia act of 1792

Section 1 of this law provided for universal military service of all white, able-bodied citizens between the ages of eighteen and forty-five. All such were to be enrolled by the commanding officer of the district. Members of the militia must furthermore provide their own arms and equipment, together with the necessary powder and ball. The fact that the democratic system of universal service was adopted, together with a system of territorial recruiting, seemed of such vital importance in the eyes of a trained observer that all the other defects of the law were considered as secondary.[2] But there were certain very fundamental defects. Instead of having one small national army supported by indirect taxation, there were thirteen or more state armies supported by direct contributions of the citizens of each state. Even this might have been tolerated had the militia been well disciplined and well trained; but as it was they were "totally ignorant of the first principles of military art."[3] Finally, this law contained no penalty, and the citizens might or might not comply with its provisions. The democratic principle of universal service turned out to be a scheme for the organization and training of their own militia, with the result that the militia was neither well regulated nor uniform throughout the country.

Deficiencies of militia act of 1792

This law remained in nominal force for over a hundred years, although practically obsolete a few years after its passage. The militia of the states, as such, has not always proved a very effective force. For example, in the War of 1812 the governors of Massachusetts and Connecticut refused to call out their militia when summoned to do so by the president of the United States. Although the Supreme Court of the United States overruled the Supreme Court of Massachusetts and held that the president was the sole judge of the exigency, there seemed no method by which an unwilling state could be compelled to call out its militia.

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[1] U. S Stat. at Large, Vol. I, p. 271.

[2] Emory Upton, Military Policy of the United States, p. 85.

[3] Ibid

Revised legislation, 1903, 1916

Attempts have been made at various times to reorganize and improve the militia, the most important of which were in 1903 and in 1916. By these laws every able-bodied citizen between the ages of eighteen and forty-five is considered a member of the militia, which is divided into two classes, — the organized, known as the National Guard, and the unorganized, or the Reserve Militia. Enlistment in the National Guard is voluntary. Of still greater importance are the provisions for a uniform equipment and armament. On occasions in the past the militia has sometimes been found of little value because its arms and equipment were such that it could not be used with the regular troops. Delay has resulted in obtaining the proper equipment. The federal government now furnishes the arms and equipment and in return has the privilege of inspection and discipline. Most important of all, the militia can be summoned directly by the president without the intervention of the state governor. By the reorganization of 1916 the militia is still further federalized. Pay is given to the officers and men provided they are drilled a certain number of hours and attain a certain standard, which is enforced by frequent inspections by federal officers. It is expected that within five years this force will reach a minimum of four hundred and twenty-four thousand. Under the terms of the new act the militia will be required to give three years of active service and three years in the reserve, subject to certain calls.

Federalization of the militia

The utilization of the militia act of 1795

In 1792[1] Congress passed a statute regulating the right of utilizing the militia. By this act Congress vested in the president the power of calling upon the militia of the states most concerned. This was repealed in 1795 when another act of similar import was passed, and although subject to frequent revisions, still the principle remained the same until the Reorganization Act of 1916. By the act of 1795 Congress intrusted to the president the decision of utilizing the militia to suppress domestic disturbances, nothing being said concerning his right to utilize it for foreign service. The leading case was decided in 1827, when the prerogative of the president was upheld in these words:

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[1] U. S. Stat. at Large, Vol I, p. 264.

Opinion in *Martin* v. *Mott*

> Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the president are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the order of the president? We are of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the president, and that his decision is conclusive upon all other persons.[1]

Before 1916 the president could use militia only within domestic territory

These acts, it will be noticed, only vest in the president the power to call forth the militia for service within the territory of the United States. Previous to 1916 he had no power to utilize the militia for foreign service. This was circumvented, however, by calling for volunteers and accepting as units such militia as should volunteer. It should be clearly understood, however, that this was purely a voluntary service on the part of the militia, who, until they were actually accepted as volunteers, were not subject to the orders of the president but to those of the governors of the states. The act of 1916, however, gave the president additional power. He still retains the power of utilizing the National Guard, according to his judgment, within the territory of the United States; but in addition, when Congress authorizes the use of the armed forces in excess of the regular army, the president may draft into military service any or all members of the National Guard. This double military allegiance of the militiaman is emphasized in the very oath he takes, for he swears to obey the orders of the president and the governor of his state. When called upon by the president he is automatically relieved of his allegiance to the state and becomes subject to the orders of the federal government. These new powers of the president and the federalization of the National Guard will doubtless produce a far more efficient military instrument, but whether they have not imposed such arduous burdens upon the militia as to discourage enlistment is a question yet to be settled.

By act of 1916 the president on authorization of Congress may draft the National Guard from the states into the army

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[1] *Martin* v. *Mott*, 12 Wheat. 19, 29, 30.

VOLUNTEERS

Volunteers in War of 1812, in Civil War, in War with Spain

A third branch of the army which has been utilized in all the important wars of the United States is composed of volunteers. During the War of 1812, 30,000 volunteers were called for and only 10,000 actually served, while during the Civil War six calls for volunteers were made and, allowing for reenlistments, over a million responded. In the war with Spain the president called for a total of 125,000 volunteers, and this number was exceeded. There is no question that after discipline and training these volunteers do excellent service, but the delay necessary for this training has sometimes resulted in the employment of untrained troops at a frightful cost. It is therefore argued that it is more economical to maintain an adequate standing army supported by a trained and disciplined militia than to rely upon the enthusiasm of untrained volunteers. This is what the legislation urged by Secretary Garrison hoped to accomplish. In the Senate a provision was added to the reorganization bill, providing for a "Continental Army" composed of federal volunteers, who should be trained for two months in each of their first three years of enlistment, and then go on the reserve lists for three years. It was proposed to raise by yearly increments of 34,000 a force of 500,000. This provision, however, was not acceptable to the House and was dropped in conference. Hence, as the law stands, the president has at his immediate command a regular army of 175,000, and the federalized National Guard, which theoretically has a minimum of 424,000, although actually the numbers are far less. Even this force will prove inadequate for any serious war, and volunteers will have to be called for or some plan of compulsory service adopted. But instead of being rushed into the service they can be adequately trained and prepared while the increased regular army and National Guard bear the first shock.

The proposed Continental Army

THE NAVY

The decline and rebuilding of the navy

At the end of the Revolution the three remaining ships of the navy were sold and the navy was abolished. The rebuilding of the national navy did not begin until 1794, when six frigates were ordered. By 1812 the United States had sixteen effective vessels which rendered good service in the war with England. Between 1814 and the Civil War there was little development, but during the Civil War there was an enormous expansion, and at its close there were over six hundred vessels in commission. After the war, the navy was rapidly reduced, and few new vessels were built. The beginning of the present navy dates from 1885, since which time the growth, although showing some lapses, has been fairly steady and consistent. Before the outbreak of the World War the United States ranked third among the powers of the world, being surpassed only by Great Britain and Germany.

THE MILITARY AND NAVAL LEGISLATION OF 1917

The navy

The agitation for preparedness in 1916 forced a great increase of the navy. Congress adopted a three-year building program by which about one hundred and sixty vessels of various sorts were to be built, of which sixty-seven were begun in the first year. The amount appropriated for the first year's program, not including the amount necessary for armament, was nearly $170,000,000. With the entrance of the United States into the war even this program was exceeded, and because of vastly increased cost of construction the amount appropriated was enormously increased.

Plan of the administration

The army

The National Guard

The draft

The entrance of the United States into the European War made it necessary to provide for further increases in the military and naval forces and to extend the already wide powers of the president in military affairs. On April 5, 1917, Secretary Baker laid before Congress a bill prepared by the General Staff, which had the approval of the president. By this the regular army was to be recruited to its full strength, the National Guard was also to be brought to full war strength and mustered into the federal service. Two increments of 500,000 each were to be obtained by a selective draft. In all, the administration called for about 1,727,000 men.

The plan opposed in the House

The bill met with opposition in the House. The old idea of a volunteer force was strongly held. Speaker Clark asserted that "conscript" and "convict" meant the same to the people. The chairman of the Committee on Military Affairs would not accept the bill, and it finally was carried through the House, in spite of his opposition and that of Speaker Clark and Claude Kitchin, the floor leader of the majority, by Julius Kahn, a German by birth. In the administration bill the ages of liability for draft were nineteen to twenty-five, but the House insisted on raising the ages to twenty-one and forty.

Changes in the Senate

In the Senate, Senator Chamberlain, chairman of the Committee on Military Affairs, vigorously supported the administration's policy. Several changes, however, were made. An amendment was inserted authorizing the president to accept a volunteer force of not less than one division nor greater than four divisions, to satisfy the friends of President Roosevelt, who desired to raise a force similar to the "Rough Riders" of the Spanish-American War. The age for the draft differed alike from the administration measure and the House bill, and was fixed at twenty-one to twenty-seven. In conference the age was finally compromised at twenty-one to thirty inclusive, and upon signing the bill the president let it be known that he could not take advantage of the permission to utilize or raise volunteers.

The military force thus provided was of three kinds, the regular army, the National Guard, the new National Army.

The growth of the army and National Guard

On the first day of April, 1917, the number of the regular army stood at 121,000, raised entirely by voluntary enlistment. On the last day of December, 1917, it was 475,000. This increase had been obtained solely by voluntary enlistment. The National Guard had 76,713 enlisted men actually in the federal service on April 1, 1917. Orders were issued to recruit the Guard to full war strength, and on August 5 it was drafted into federal service. On December 31, 1917, there were over 400,000 men actually in service in the National Guard.[1]

The Draft Act of 1917

The act of May, 1917, directed that men between the ages of twenty-one and thirty should be registered according to regulations made by the president. The president was furthermore authorized to utilize the services of all departments and officers of the United States or of the several states, and severe punishments were provided for neglect or failure to perform any duty assigned by the president or his agents. The president fixed June 5 as registration day and directed that all registrants should appear at the regular polling places of the district in which they resided and fill out the necessary papers. In all 9,780,685 men were registered, this number being only about 4 per cent less than the number estimated by the Census Bureau. On July 13 the president issued an order drafting 678,000 men selected from those who had registered. Boards were appointed in every state, for each county, and for every city over 30,000, or in larger cities for each section over 30,000, to hear and determine the questions of exemption according to the provisions of the act and the regulations made by the president. Boards of Review were also established in the several federal judicial districts whose decision was final unless revised by the president.

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[1] See Secretary Baker's statement to the Senate Committee on Military Affairs. See also American Year Book (1917), p. 289.

Exemptions under the Draft Act

The act itself exempted the executive, legislative, and judicial officers of the United States and of the several states, ministers of religion, students in theological schools, persons already in the military or naval service of the United States, and members of recognized religious sects whose creed forbade its members to engage in war. There were also numerous classes which the president might exclude or discharge from the draft. These included county and municipal officers, certain government clerks, "persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment," and persons having dependents. For these classes the president might make rules which would exempt them entirely or accept them for partial service.

Registration

Registration passed off quietly with little disturbance or resistance to the law. During the summer the various exemption boards examined the men on the lists, accepting or rejecting them according to the regulations made by the president. In September the first contingents were sent to the several cantonments, sixteen of which had been constructed for their training. Thus by December 31, 1917, the National Army had been raised to a strength of 480,000 men with a reserve of 84,000 officers and 72,000 enlisted men.[1]

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[1] Secretary Baker's figures given in a statement before the Senate Committee on Military Affairs; American Year Book (1917), p. 289.

Criticism of policy of the government

Considerable criticism was made concerning the number of men raised, their equipment and care. But taking all things into consideration the raising and equipping of an army of over one and a half million men was accomplished with as little disturbance and as few errors as could reasonably be expected. Certainly the achievement was far more successful than was the enlistment of a force about a sixth as large during the Spanish-American War. The death rate of the army, moreover, was only 7.5 as compared with 20.14 in 1898. It must be freely admitted, however, that mistakes were made, and that a lack of coordination was disclosed which made necessary some rather drastic reorganization in the War Department. Moreover, the administration asked for and finally obtained legislation which enabled it to transfer the functions given to various departments and bureaus by law, and to utilize any department or agency of the government as necessity required.[1] The most fundamental criticism, however, was that the administration did not make adequate preparation in the way of ordnance or supplies, and that even the large forces raised were far too small for the contribution expected from the United States. In answering these criticisms Secretary Baker maintained that the men would be properly equipped and trained as fast as they could be transported to the fighting front;[2] and that the shortage of ships and the necessities of the Allies for food and other supplies limited the size of the army which could be sent. Early in July, 1918, it was announced that over a million men had already been transported, and on November 1, 1918, the expeditionary force numbered nearly two millions.

When not in actual service the militia receives the same training as the regular army, although much curtailed. When called into active service, the articles of war apply to the militia, volunteers, and regular troops alike. Discipline is then maintained, as in the regular army, by means of courts-martial.[3]

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[1] See Chapter X.

[2] "Arms of the most modern and effective kind . . . are available for every soldier who can be gotten to France in the year 1918."

[3] See Military Laws of the United States, pp. 962, 963; W. W. Willoughby, The Constitutional Law of the United States, Vol. II, p. 1190.

MILITARY LAW

Military law in England

Regulations applicable to the army in time of peace did not come into practice in England until 1689 with the passage of the Mutiny Act. Before that date military regulations or articles of war were issued either by the Crown directly or by a commander acting under some commission. These articles, however, remained in force only during the active service of the troops for which they were issued, and had no binding force in time of peace. Gradually, however, these rules assumed a form more or less fixed and were consolidated after 1689 in the Mutiny Act. In the United States, Congress issued, in 1775, a series of rules modeled upon the English act, which with some revision was continued until a new series was issued, September 30, 1776. These were adapted to new conditions in 1789, and thoroughly revised in 1806; from that date they have continued with many minor modifications.

Military law in the United States

Double obligations of a member of the army or navy

Upon enlistment in the regular army the soldier becomes subject to the military regulations both in time of war and in peace. This is but an additional new obligation he assumes and does not free him from the obligations of civil and criminal law. He is under the necessity of obeying both and may be tried by and punished according to the procedure of both, should he commit an offense punishable alike by the military and civil codes. This position may conceivably put him in an unfortunate dilemma; for if he fails to obey the commands of his superior officers, he may be severely punished under the military code; and if he does obey, in so doing he may transgress a civil law and be held responsible before the courts. The dilemma may be unfortunate, but, as Justice Stephen said, it was the "inevitable consequence of the double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army." The responsibility, moreover, extends to all superiors who in any way are concerned with the giving of an order contrary to the law of the land. An order, without the authority of law, even if given by the president of the United States, acting as commander in chief, will not relieve the officer or the president from the consequences of the responsibility for the action. This doctrine was applied in 1804 by Marshall when he said:

Opinion of Marshall that the commands of a superior do not justify illegal actions

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that when, in consequence of orders from the legislative authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against the government from which the orders proceeded. . . . But I have been convinced that I was mistaken and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.[1]

Courts-martial

The application of military law is, except in the case of emergency, in the hands of courts-martial. These are executive boards appointed either directly by the president or by commanders acting under his authority. Commissioned officers are triable only by general courts-martial, which must contain from five, at least, to fifteen officers, who if possible shall not be of inferior rank to the accused. Enlisted men may be tried for certain offenses by summary courts-martial composed of one officer, while courts of three officers are provided for garrisons in cases not capital. There is no jury employed, either grand for indictment or petit for trial. The courts-martial are not technically judicial tribunals but executive boards. The findings of the courts-martial are submitted to the authority which appointed them, who is known as the reviewing officer. While he may not increase the punishment, he may diminish it, or, if dissatisfied, refer the case for a second consideration.

The constitutionality of the sentence of courts-martial was thus sustained in 1858:

> . . . With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the customs

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[1] *Little* v. *Barreme*, 2 Cranch, 170, 178, 179.

Constitutionality of the sentences of courts-martial

of the sea, civil courts have nothing to do, nor are they in any wise alterable by them. If it were otherwise, civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no *jurisdiction over the subject-matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress.[1]

But, as has been said, punishment by a court-martial does not serve as a bar to punishment by a civil or criminal court. This was affirmed in 1878 when the court said:

Punishment by courts-martial no bar to subsequent punishment by civil or criminal courts

> In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee, that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee.[2]

Actual practice

To avoid such conflicts the articles of war direct that when any officer or soldier is accused of capital crime or an offense against the person or property of any United States citizen, the commanding officer, except in time of war, shall turn the offender over to the civil authorities. This article includes offenses against municipal ordinances, but applies only to criminal charges. But the article does not apply to soldiers on leave, who may be arrested like ordinary citizens. If the offense be one committed against both authorities, the authority which first assumes jurisdiction over the offender retains him until the sentence is completed. But the completion of the sentence does not serve as a bar to subsequent punishment, although it is probably taken into consideration in the second trial, if one be required.

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[1] *Dynes* v. *Hoover*, 20 Howard, 65, 82, 83.

[2] *Coleman* v. *Tennessee*, 97 U S. 509, 518.

The Power to Declare War

War, when formally declared, is announced by a resolution

This power is vested in Congress, and in the debates in the convention of 1787 it was suggested that Congress should also receive the power to make peace; but inasmuch as peace is usually the result of a treaty, and the power to make treaties is vested in the president and the Senate, the proposed addition was omitted. The usual method of declaring war is by a resolution passed by both Houses and signed by the president. But it has sometimes happened, as in the Mexican War, that the president, utilizing his power as commander in chief, could practically force a conflict. Again, in 1913 and 1914, although President Wilson was authorized to utilize the forces of the United States against Mexico, no war was declared, and technically peace existed between the two countries. Again, in the case of the war with Spain, the Supreme Court held that war existed from the breaking off of diplomatic relations because Spain interpreted our demand for intervention as declaration of war, although the actual resolution of Congress was passed at a later date.[1] And still again, in the Civil War no declaration was ever made, but it was held by the court that war existed from the date of the proclamation of the intended blockade.[2] From these examples it is easy to see that the mere power to declare war is not of supreme importance.

Exceptions

Power of Congress to determine the conduct of the war by legislation

Of greater importance is the actual power which Congress exercises in legislation, once war is declared. Of so much importance is this power that no president would dare engage in any policy which might result in hostilities unless he felt himself supported either by Congress or by the people. Actually the president is in close touch with the congressional leaders, and the formal declaration of war is more in the nature of an advertisement of a policy already agreed upon than a new and momentous step.

The conduct of the war

As has been shown, the president as commander in chief conducts the war through his Secretary of War and the General Staff. Nevertheless, Congress has an active and important part in its operations and a voice in its conduct. Even before a declaration of war a resolution is often sought by the president either to carry out some policy or to utilize the forces of the United States for some purpose which, although within his legal power, demands congressional or popular support. Since these forces have generally been inadequate hitherto, Congress has passed resolutions authorizing the president to call for volunteers. In the financial field Congress is most active. Here all the powers of the national government in the way of taxation, borrowing money, and appropriations are utilized. The first step in a serious crisis is generally a resolution to authorize the Secretary of the Treasury to make a loan through selling bonds. Additional revenue is obtained by increasing the internal revenue taxes and sometimes by a general revision of the tariff duties. From time to time Congress may authorize an increase in the size of the regular army or call for volunteers. The Senate through its power to confirm or reject all presidential appointees exercises large influence in the choice of officers. The actual designation of the commanding officers and the direction of the campaigns is in the hands of the president, guided by the opinions of his secretaries and the General Staff. Nevertheless, through the refusal of the necessary legislation the president may be compelled to abandon the plans which he and his advisers have made.

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[1] *The Pedro*, 175 U.S. 354.

[2] *Freeborn* v. *The Protector*, 12 Wall. 700.

Congress may increase the army, levy new taxes, and issue bonds

The president directs the actual operations but may be helped or hindered by congressional action

Privateering abolished

Congress is given power to issue letters of marque and reprisal, in other words to authorize the commissioning of privateers. This method of warfare, however, was abolished by the declaration of Paris in 1856. Although the United States has never assented to this treaty, yet she has consistently governed her conduct by its terms in all the wars she has been engaged in since that date. Congress also makes regulations for the conduct of the army and navy in the matter of capture and prize.

A war is terminated by a treaty

A war is finally brought to an end by a treaty, negotiated according to the advice and plans of the president and ratified by the Senate.[1] Very often, as in the case of the war with Spain, the treaty provides for the purchase of certain territory or the payment of certain sums either agreed upon or to be

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[1] See p. 200.

House of Representatives must make appropriations called for by treaty

settled at a future time. The appropriation of these amounts gives the House of Representatives an opportunity to question the treaty. According to the rules of international law, a state must appropriate the sums agreed upon by a legally ratified treaty. This rule was insisted upon by Jackson when he had Congress pass retaliatory measures because the French Chambers neglected to make the appropriations required by a treaty. In practice the House of Representatives has always followed the course required by international law, although several times questioning the treaty and threatening to refuse to make the necessary appropriations.

Pensions

In statutes raising the army, either regular or volunteer, not merely is the pay provided but sometimes the terms are stated upon which pensions will be granted. The actual appropriations for pensions are not made until needed, and then both general and special pension acts are passed.[1]

Compensation and insurance

In 1917 the United States offered to its forces insurance and a scheme of compensation for wounds and injury. It is hoped that by the utilization of this provision the scandals and extravagances which characterized the administration of the former pension system will be avoided.

Military Government in Time of Peace

Military government in time of peace rests on acts of Congress

The president, acting as commander in chief may establish military government in both foreign and domestic territory during a war.[2] Military government may also exist in time of peace. But this government derives its force not from the orders of the president but from the acts of Congress. Until Congress acts, however, the president may continue the existing form of government established during a war, subject always to the power of Congress to alter or abolish it. It may seem wise for Congress to delay action and thus tacitly to approve the system established by the president, but in this case the president is not acting as commander in chief but as chief executive. Such was the case after the Spanish war with regard to the Philippines. These islands were acquired in 1899, and by Congress the government and control was vested in the president as chief executive. Thus for three years the islands were under the control of various commissions appointed by and responsible to the president. In 1902, however, Congress passed the Philippine Act establishing a territorial government, in which the natives had some little voice in the affairs.

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[1] See pp. 260–261.

[2] See pp. 193–194.

In like manner, although the president may establish military governments in hostile domestic territory under his power as commander in chief, when peace is restored, although these governments may be continued, the power to alter or abolish them is vested in Congress. In *Texas* v. *White*[1] the court in passing upon the reconstruction policy said:

Texas* v. *White

> The power exercised by the president was supposed, doubtless, to be derived from his constitutional functions, as commander in chief; and, as long as the war continued, it cannot be denied that he might institute temporary governments within insurgent districts, occupied by the national forces, or take measures in any state for the restoration of state governments faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.
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> But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. Under the 4th article of the Constitution, it rests with Congress to decide what government is the established one in a state.

MARTIAL LAW

Martial law a form of the police power of the state

Military law has been discussed. Yet in another way the military forces of the United States are sometimes utilized. It is often popularly said that martial law is proclaimed in districts where there are riots or insurrections. Under the guarantees of our government such a thing as the substitution of military rule for civil law is impossible without *ipso facto* creating a state of war. What then is the meaning of the popular phrase "martial law"? As Professor Willoughby shows,[2] it is but a form of the police power of the state. In its very origin, its operations, and its consequences it is but the utilization of the military forces by the civil authorities. Civil rights are not destroyed, new offenses are not created, military government is not established, by a proclamation of martial law. All that has happened is that the civil authorities, being unable to enforce the laws with the ordinary civil officers, have summoned the military forces to assist them in enforcing not irresponsible military rule but the civil laws — not to wage war but to keep the peace. The extent to which force may be used and civil rights interfered with in order to keep the peace is a very delicate question. No fixed rules can be laid down, but each individual case must be justified on its merits, not at the time of the emergency but by a civil court at some later time. It is this possibility of subsequent judicial review and trial by the civil courts that most markedly distinguishes so-called martial law from military rule. In 1908, however, in the case of *Moyer* v. *Peabody*,[1] the court, in an opinion by Justice Holmes, seemed to grant to officers discretionary rights not reviewable by the courts. After quoting the provisions of the constitution of Colorado which gave the governor the right to use the military forces of the state to suppress insurrections, he said:

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[1] 7 Wall. 700, 730.

[2] The Constitutional Law of the United States, Vol. II, pp. 1229 ff.

Justice Holmes on martial law

> . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by the way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had no reasonable ground for his belief. . . .
>
> No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case great weight is given to his determination, and the matter is to be judged on the facts as they appeared then, not merely in the light of the event. . . . When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. . . .

Although an officer may be called upon to justify his conduct later, great weight is given to his determination of the facts

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[1] 212 U. S 78, 84, 85, 86.

> This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances as was consistent with the Fourteenth Amendment, we are of the opinion that the same is true authorizing by implication what was done in this case.

The Use of Martial Law

Can martial law be applied outside the area of conflict?

As has been said, when insurrection becomes widespread and serious, it may change its character and become war. When war begins, the rebel becomes an enemy liable not to civil or martial law but to the rules of war. The president or the executive then may exercise any or all of the powers of the commander in chief in time of war. But in time of civil war certain districts may remain loyal, exposed to the dangers of invasion or rebellion, but actually in a state of peace. Can military rule or martial law be applied by the president in such regions which lie outside the actual area of the conflict? Such was attempted in the Civil War, and in the case of *Ex parte Milligan*[1] the court laid down the following principles:

Opinion of the court that martial law could only be used in case of actual necessity and real invasion

> It will be borne in mind that this is not a question of the power to proclaim martial law, where war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander at the head of his army can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been and was threatened by invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded that invasion was at an end,

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[1] 4 Wall. 2, 126, 127.

and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration. . . .

When the courts are actually closed the necessity has arisen

It follows from what has been said on this subject, that there are occasions where martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

Criticism of the opinion of the court

In commenting upon this opinion Professor Willoughby[1] very justly takes exception to the words "The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration." To forbid martial law where the courts may be open is too general a prohibition. Martial law may be necessary in order that the courts may remain open. It is true that the necessity for martial law must be actual, but this necessity cannot be determined by a general rule.

THE SUSPENSION OF THE WRIT OF HABEAS CORPUS

Purpose of the suspension of the writ of habeas corpus

Martial law need not necessarily involve actual armed conflicts. In fact almost as effective as the actual presence of military force is the power of the executive to arrest and detain those suspected of encouraging rebellion. To do this may require military force, but often such arrests may be made by civil officers. Under ordinary conditions the prisoner could by the writ of habeas corpus compel the authorities to show legal justification for his detention. If such be wanting he may be released at once. Such a proceeding might defeat or hamper the power of the executive to quell the disturbance. Hence the first step in the exercise of martial law is to suspend the operation of this writ.

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[1] The Constitutional Law of the United States, Vol. II, p. 1251.

Congress, not the president, alone may suspend the writ of habeas corpus

Before the Civil War it was held[1] that this could only be accomplished by Congress, but, upon the advice of his Attorney-General, Lincoln suspended this writ both within and without the actual area of hostilities. This drew from Taney, the Chief Justice, a protest[2] which perhaps was heeded, for Congress in 1863 passed an act authorizing such suspension. To-day it is generally agreed that this power is in the hands of Congress and not of the executive.

Effect of the suspension of the writ

It should be remembered that the suspension of the writ does not create new offenses nor vest the officers with new powers to arrest. It merely furnishes them with a legal and valid excuse for not complying with its summons. They are legally liable to prosecution for any illegal act, arrest, or imprisonment they have committed. This emphasizes again the distinction between war, with its military law, and a condition short of war called martial law. In war the executive cannot be made responsible to the court; in a condition where martial law is proclaimed his acts may be tested in those tribunals. Consequently, when the writ of habeas corpus is suspended it is usual to pass an act indemnifying the executive and his officers for any illegal acts they may have performed. Thus the very necessity of this act of indemnity is in itself a recognition of the distinction between war and martial law.

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[1] *Ex parte Bollman*, 4 Cranch, 75.

[2] *Ex parte Merryman*, in J. B. Thayer, Cases on Constitutional Law, Vol. II, p. 2361.

CHAPTER XVIII

FINANCE

THE TAXING POWER[1]

The taxing power

First among the legislative grants of Congress is the power to levy taxes. The Supreme Court says:

> This power . . . is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, and necessity and public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative[2]

Expressly granted by the Constitution

So essential to the existence of a sovereign government is this power that it has been argued that the specific statement was unnecessary. But with the experience of the Confederation fresh in mind, the framers of the Constitution did not think it wise to leave to implication this power, the absence of which had proved one of the greatest defects in the Articles of Confederation. Thus, by express statement Congress is given the right to levy taxes, thereby again emphasizing the fact that the federal government is one of enumerated powers, and that apart from constitutional grants it possesses no inherent sovereignty.

It has sometimes been asserted that this clause contains two grants, (1) to levy taxes, and (2) to provide for the defense and general welfare of the United States. By thus interpreting the clause the federal government would cease to be one of limited enumerated powers and would be endowed with unlimited power to do anything for the general welfare of the United States. Such is not a proper reading of the clause. By the

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[1] The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States — The Constitution of the United States, Article I, Sect. viii, clause 1

[2] *Meriwether* v. *Garrett*, 102 U S 472, 515

Correct interpretation of the grant

correct interpretation, the words "to pay the debts and provide for the common defense and general welfare of the United States" limit the words "to lay and collect taxes." The true meaning of the clause is that Congress shall have power to lay taxes *in order* to pay the debts and *in order* to provide for the general welfare of the United States. "In this sense, Congress has not an unlimited power of taxation; but is limited to specific objects, — the payment of public debts, and providing for the common defense and general welfare."[1]

Fundamental limitations from the definition of a tax

In addition to these express limitations upon the purposes for which taxes may be levied, there is the fundamental limitation found in the very definition of a tax. It has been stated that taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.[2] This statement was cited with approval in *Loan Association* v. *Topeka*, where the court said:

Must be levied for a public purpose

> To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less robbery because it is done with the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.[3]

What is a public purpose?

It is far from easy to find decisions as to what constitutes a public interest which must be the object of federal taxation. The court has more frequently been called to pass upon the question arising out of state legislation. From these decisions it seems that the court would hold that a tax was not for a public purpose where the benefit to the public was merely incidental to private gain. Conversely, the court has upheld the constitutionality of laws levying taxes and making grants defrayed out of the treasury to private individuals where the public was directly benefited and the individuals incidentally.[4] The protective tariff, for example, may be upheld on the ground that, although the manufacturer may be incidentally benefited, the

[The tariff]

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[1] J. Story, Commentaries on the Constitution, Vol I, Sect. 908

[2] T M. Cooley, Constitutional Limitations (6th ed), p 479.

[3] 20 Wall. 655.

[4] E. McClain, Constitutional Law, pp. 124 et seq.

government is but using its discretion in choosing what objects it may tax.[1] Again, the protective tariff is justified as a regulation of commerce.

[Bounties]

The constitutionality of federal bounties has never been clearly passed upon by the Supreme Court, but if sustained at all they would probably be upheld upon the grounds stated by the court in 1898:

> Bounties granted by the government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be maintained, production or manufacture to be stimulated, or moral obligations to be recognized.[2]

Specific limitations

The Fifth Amendment adds specific limitations to the methods which may be employed in federal taxation. "Nor shall private property be taken for public use without just compensation," and "no person shall be . . . deprived of . . . property, without due process of law." Although both these restrictions have been invoked against certain taxes it is evident that one refers to the taking of private property under the right of eminent domain, for which compensation should be given; while the other is a general prohibition against the taking of private property by unlawful means. Against the taking of private property by taxation without giving a monetary compensation there is no prohibition. As Cooley says:

The difference between taking property by eminent domain and by taxation

> Where taxation takes money for public use, the tax payer receives, or is supposed to receive, his just compensation in the protection which the government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax; and those benefits amply support the individual burden.[3]

But although the taking of money by taxes without giving direct compensation is not depriving the individual of his

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[1] The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects on which an excise should be laid — *McCray* v. *United States*, 195 U. S. 27, 61

[2] *Allen* v. *Smith*, 173 U. S 389, 402

[3] T. M Cooley, Constitutional Limitations (6th ed.), p. 613.

Due process of law as applied to taxation

property without due process of law, it may become so under certain circumstances. Should the court declare that either the purpose for which the tax was levied or the method by which it was assessed and collected was improper, the individual might claim that he was deprived of his property without due process of law.

Taxation must be for a public purpose

Taxing body must have jurisdiction

From a study of the various cases four rules have been formulated which must be observed in order that the tax be according to due process of law:[1] (1) The tax must be for a public purpose. This has already been discussed. (2) Either the person or the property taxed must be within the jurisdiction of the government levying the tax. It is to be noted that it is not necessary that both the person and property should be within the jurisdiction. Thus persons residing in one jurisdiction and possessing property in another jurisdiction may be taxed by both jurisdictions for the same property. Although this produces double taxation, the court has held that it was not contrary to the due process of law. (3) In the assessment and collection of the tax certain guarantees against injustice to individuals, especially in the way of notice and opportunity for a hearing, shall be provided. Due process of law does not require a judicial hearing; it is satisfied by the familiar method of the action of the board of assessors and warrant of the tax collector.[2] Indeed, the court has said:

Guarantees against injustice must be provided

[Due process of law does not require a judicial hearing]

> Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law [3]

Uniformity

(4) The principle of uniformity must be observed. This general principle is enforced by the specific constitutional direction, that "... all duties, imposts, and excises shall be uniform throughout the United States."

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[1] W. W. Willoughby, The Constitutional Law of the United States, Vol. I, p 584.

[2] See pp 235-236

[3] *Kelley* v. *Pittsburgh*, 104 U S 78, 80

In discussing this the court has said:

> The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. "It shall be uniform throughout the United States." Is the tax upon tobacco void because in many of the states no tobacco is raised or manufactured? Is the tax upon distilled spirits void because a few states pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and same effect in every place where the subject of it is found.[1]

Again, in 1894, the court said:

> The uniformity required by the United States Constitution . . . is not . . . as respects its operation upon individuals, but is merely a geographical uniformity requiring the same plan and same method to be operative throughout the United States.[2]

Uniformity means that the same classification shall apply throughout the United States

Taking the two statements together, uniformity means that the same principle of classification shall apply throughout the United States. It does not mean that all persons shall pay the same rate but that all persons or objects within the same class shall pay the same rate. Uniformity does not mean that the states shall contribute the same amounts but that the same classification and the same rate of assessment shall be applied to all states alike.

Uniformity does not apply to direct taxes

It is to be noted, furthermore, that the principle of uniformity is not applied to direct taxes, but only to duties, imposts, and excises. Imposts, which in the largest sense of the word would include all taxes, have come to mean in the United States indirect taxes. Duties are taxes levied upon the importation of goods into the country. Excises are taxes imposed upon the process of manufacture or trade, or upon some right or privilege, and in the United States are commonly known as internal revenue taxes. To all but direct taxes the principle of uniformity applies. The other classes of duties and excises are restricted in two other ways: (1) "No tax or duty shall be laid on articles exported from any State."[3] (2) "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."[4]

Other limitations

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[1] *Head Money Cases* (1884), *Edye* v *Robertson*, 112 U. S. 580, 594.

[2] *Knowlton* v. *Moore*, 178 U. S. 41, 42.

[3] The Constitution of the United States, Article I, Sect. ix, clause 5

[4] Ibid. Article I, Sect. ix, clause 6. See also *Cooley* v *Board of Wardens of the Port of Philadelphia*, 12 How. 299; *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176.

Direct taxes

"Direct taxes," however, "shall be apportioned among the several States which may be included within this Union, according to their respective numbers. . . ." Many federal taxes have been resisted on the ground that they were direct taxes and hence unconstitutional until apportioned. The earliest case arose in 1798, when the court held that a tax upon carriages was not a direct tax within the meaning of the Constitution. In the opinions given by the various justices it was suggested that direct taxes, as contemplated by the Constitution, were of two sorts, "a capitation or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax upon land." Justice Iredell, however, in a dictum, laid down the following rule :

Definition of the court in 1798

> As all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned*.
>
> If this cannot be *apportioned*, it is, therefore, not a *direct* tax in the sense of the Constitution.
>
> That this tax cannot be apportioned is evident.[1]

In other cases the dictum of the court, that direct taxes were of only two sorts, capitation taxes and taxes upon land, was followed.[2] This conclusion was unanimously repeated by the court in sustaining the income tax of 1862.[3] In 1895, however, the court in declaring the income tax of 1894 a direct tax, and therefore unconstitutional, said :

Income taxes held to be direct taxes in 1895

> The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent and income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.[4]

Moreover, at the rehearing of the case the same reasoning was applied to taxes upon income from personal property, and, by a decision of five to four, taxes upon income from real estate or personal property as well as poll taxes and taxes upon land were held to be direct taxes.

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[1] *Hylton* v *United States*, 3 Dall. 171, 181.

[2] W. W Willoughby, The Constitutional Law of the United States, pp. 615, 616.

[3] *Springer* v *United States*, 102 U. S 586

[4] *Pollock* v *Farmers Loan and Trust Co.*, 157 U. S. 429, 581, 158 U. S. 601

The c tion tax 1909

In 1909 a corporation tax of one per cent upon all net profits over five thousand dollars was added to the tariff law of that year. In 1911 the court held that this was not an income or direct tax, but rather a levy on a peculiar form of organization, namely, a corporation. The tax was thus an excise tax upon the privilege of doing business under corporate form. Such taxes, as has been shown, need not be apportioned according to population.[1]

The Sixteenth Amendment

In 1913 the Sixteenth Amendment was adopted, which gave Congress power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Acting upon this, Congress in the tariff act of 1913 levied an income tax.

In applying the Sixteenth Amendment the court held that the amendment relieved income taxes from the necessity of apportionment

In 1915 the constitutionality of the law was argued before the court and in 1916 upheld in all its points.[2] Chief Justice White, who rendered the unanimous opinion of the court (Justice McReynolds not taking part), first met the contention that the tax, not being a direct tax, must therefore be uniform. He showed that the amendment did not confer the power to levy income taxes as such, for that power was already possessed by the government; nor did the amendment necessarily make the tax an indirect tax, like an excise or impost; but that the amendment was drawn for the purpose of doing away with the principle established in the Pollock case:

> That is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.

The tax upon incomes from land and personal property still remained direct taxes according to the ruling of the Pollock case, but were by the amendment relieved from the rule of apportionment. They did not by the amendment become indirect

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[1] *Flint* v. *Stone Tracy Co*, 220 U. S 107

[2] *Brushaber* v. *Union P. R Co*, 240 U. S. 1, 18

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taxes and thus subject to the rule of uniformity. The other contentions, that the rule of due process of law was violated in the exemptions, in the progressive rate, and in the collection at the source were held to rest upon "the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing."[1]

PROCESS OF REVENUE LEGISLATION

Financial legislation governed by political rather than financial considerations

The most significant and characteristic feature of revenue legislation in the United States is the predominance of political and the absence of financial considerations. This condition exists for two reasons. The first is the lack of connection between the committees charged with raising the revenue and those charged with the appropriations. One committee frames the bills levying taxes while eight committees frame the bills making appropriations. No single committee or person is responsible for the equalization of the two.

Lack of coördination

Indirect tax is the least unpopular

The second reason, and the more fundamental one, lies in the nature of the taxes levied and in the political history of the two parties. No taxes are popular, but the tax which is most easily disguised, whose burden can be most easily shifted, is the least objectionable from a political standpoint. The framers of the Constitution probably recognized this, for they made the levying of direct taxes so difficult that it was evident that indirect taxes were to be considered the normal kind. Two kinds of indirect taxes were possible: those collected at the ports — customs duties laid on articles imported into the country — and excise taxes upon the manufacture, sale, or possession of articles.

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[1] 240 U. S. 26

Political parties divided over the nature of taxes

In making a choice between these taxes came the first and most fundamental and persistent division of political parties. Both parties planned to use and have used both customs duties and internal excise taxes. But the Federalist party, and its successors, the Whig and Republican parties, have insisted that these taxes be levied in such a proportion that the greater amount should be raised by customs duties, and that the customs duties should be so arranged that American industries, particularly manufacturing, should be protected. Thus, in every revenue discussion the two political principles of tariff for revenue and tariff for protection clash. Neither party is perfectly consistent in carrying its principles to the logical conclusion, for every tariff bill contains elements of protection and certain taxes for revenue only. But a revision of the tariff is the signal for a conflict between these two ideas and a struggle between the two parties to write their theories into the bill. This is true whether the revision is taken up as a result of a party revolution, as in 1912, or whether the tariff is revised by its friends, as it was in 1909.

The revision of the tariff a great political question

Importance of committees framing tariff legislation

In the House of Representatives, in which all bills levying taxes must originate, the Committee on Ways and Means is charged with framing revenue legislation. Because of the political importance attaching to such legislation this committee is considered the most important political committee, and its chairman is the floor leader of the majority. The chairman of the Senate Committee on Finance occupies a somewhat similar position whenever a revision of the tariff is considered.

Process of framing tariff bills

Committee hearings

In the preparation of a tariff bill, the Committee on Ways and Means in the House and the Committee on Finance in the Senate usually obtain permission to sit during the recess between the sessions and to hold extended hearings. This is for the double purpose of gaining information and forestalling criticism. Some information concerning the effect of the proposed revision is undoubtedly obtained, but this information need not be utilized by the committee. As a means of allowing the public to appear before the committee and express opinions it serves a more useful purpose. Thus public hearings may be used to disarm the criticism that certain interests bring pressure to bear and have an undue influence in fixing the rates. The real work of the committee is done in secret. The members representing the majority are divided into subcommittees, each of which takes a section of the bill and prepares it in accordance with the general principles held by the party. It is at this point, if anywhere, that improper influence may be brought to bear, and it is here, if anywhere, that the great manufacturing interests strenuously push their arguments. When the bill is completed it may be submitted, as a matter of form, to the whole committee as a mark of courtesy to the minority members. Otherwise, according to the practice of the Republicans, it is submitted to the House. The Democrats in 1913 submitted the Underwood Bill, both in the House and in the Senate, to their caucuses. There are advantages and disadvantages in both methods. Unless a bill has the indorsement of the full strength of the party caucus, dissatisfied members may unite with the minority and compel the adoption of an unacceptable amendment. To prevent this is the test of skillful leadership, such as was shown by the Republicans in 1909. On the other hand, the party caucus, undeterred by the presence of the minority, may force its own leaders to accept its dictation. In 1913 Mr. Underwood had such control that no amendment was carried, either in the caucus or in the House, contrary to his desire.

Work of subcommittees

Submission to the caucus

Introduction speech

The bill is generally introduced in the House by a long and elaborate speech by the chairman of the Committee on Ways and Means, — that of Mr. Payne in 1909 occupying nine hours. The leader of the minority is given an equal opportunity to reply and then a period for general debate is provided. Every member desiring to speak is given time, if not a hearing. This is generally accepted, not out of any hope of contributing knowledge or producing any alterations, but for the purpose of showing his constituents that he is active.[1] Little or nothing is accomplished in this time, save that the leaders gain some idea of the feeling of their supporters. After the general debate the bill is read in the Committee of the Whole under the five-minute rule, and here is found real debate and discussion and criticism. Seldom, however, is an amendment carried against the desire of

Debate in the Committee of the Whole

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[1] In 1909 two weeks of general debate were given, the House meeting earlier than usual and holding evening sessions.

the Committee on Ways and Means. In 1909 only four days were allowed for debate under the five-minute rule, and preference was given to committee amendments. Separate votes were allowed on certain specified amendments and all other amendments were to be voted upon in the gross.[1] With this rule the bill was reported to the House and passed substantially as it had come from the Committee on Ways and Means.

Procedure in the Senate

After passing the House the bill goes to the Senate. Sometimes the Senate does not wait for the House bill, but has a bill of its own prepared by the Committee on Finance. When the House bill appears, the Finance Committee bill is substituted for it as an amendment and is considered by the Senate. The Senate freely alters and amends the work of the House, sometimes not merely in details but in fundamental principles.

Conference committee

After the bill has passed the Senate it is returned to the House, which promptly rejects the Senate amendments and asks for a conference. The conferees, meeting in secret, attempt to compromise divergencies both in details and principle. This is done sometimes by "trading" and sometimes by introducing new sections into the bill. The president may also take a hand at this point, and his influence is generally conclusive, for the veto of a political measure of such importance would wreck the prospects of a party.

Lack of responsibility

The greatest evil in revenue legislation is that no one is responsible — not the Senate, for it cannot originate measures; not the House, for it has to accept the amendments of the Senate. The public, however, is more and more holding the president responsible, recognizing that with his constitutional and extra-constitutional powers he is in a position, as the leader of his party, to enforce the principles of the platform on which he was elected.

KINDS AND COLLECTION OF TAXES

The greater part of the revenue of the United States now comes from three sources, customs duties, internal revenue taxes, chiefly in the nature of excises, and the income tax. The annual amount raised by customs duties since the Civil War has been enormous, ranging from a minimum of $130,000,000 in 1878 to over $330,000,000 in 1910. The collection of this revenue is at the principal seaports of the country, which are grouped into collection districts, including "ports of entry," not necessarily seaports. The process involves the entry of the goods by an invoice prepared in the country from which the goods are imported and sworn to in the presence of the consul; the appraisal of the value of goods by special officers appointed to examine goods and determine the correctness of the invoice, or, where the invoice fails to give satisfactory information concerning the price of the goods in the foreign country, the determination of the proper value of goods. From the decisions of these officers there is an appeal to a board of appraisers and thence, on legal questions, to a special Court of Customs Appeals. The third step is the payment of the duty, which formerly was required to be in gold coin or its equivalent; now greater latitude is allowed. For large ports, like New York, the process of examination, appraisal, and collection of duties necessitates the employment of an enormous force and one which is so liable to political influence and open to corruption that the civil-service reform principles were applied to it before it became customary to employ them in other departments.

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[1] Report of the Committee on Rules, April 5, 1909, in Congressional Record, Vol. XLIV, Part II, p. 1112.

Method of collection of customs duties

Internal revenue

The internal revenue, the collection of which began with the establishment of the government, is collected in sixty-six districts, and before July 1, 1919, when "war-time prohibition" was introduced, followed in January, 1920, by constitutional prohibition, came chiefly from liquors and tobacco. Of the $308,000,000 thus raised in 1914 about three fourths came from liquors, about one fifth from tobacco, and about one ninth from other sources. The miscellaneous sources at present are not important and include taxes upon playing cards, oleomargarine, filled cheeses, and certain excise taxes. During periods of war, however, the internal revenue taxes are greatly increased and new ones are added. During the Civil War, in 1864, the receipts from this source exceeded that collected from customs; during the war with Spain stamp taxes were required upon checks, receipts, proprietary articles, and many other everyday instruments of trade and commerce.

War Revenue Act of 1917

In 1917 the War Revenue Act introduced a novelty in American finance. As regards internal taxes it reverted to the period of the Civil War in the variety and number of taxes levied. It also laid new taxes which the experience of European countries had proved profitable. Chief among these was the tax upon excess profits, which alone was estimated to yield a billion dollars. The main features of the law are contained in thirteen sections, levying taxes as follows: (1) incomes; (2) excess profits; (3) beverages, running all the way from $3.50 a gallon on distilled spirits to one cent on soft drinks; (4) tobacco; (5) facilities furnished by public utilities (in this section freight taxes were levied upon transportation furnished by freight, passenger, Pullman, express, and pipe-line companies, and taxes were also levied on telephone and telegraph messages and on insurance policies); (6) war excise taxes on a variety of things, such as automobiles, musical instruments, jewelry, sporting goods, chewing gum, cameras, cosmetics, patent medicines, and moving-picture films; (7) taxes on admissions and club dues; (8) stamp taxes on stocks, bonds, notes, parcel post, and a variety of legal papers; (9) an additional tax upon inheritances; (10) additions to the rates of postage for both the first-class and second-class matter. This is the first time that the United States has attempted to use the Post Office as a means of obtaining revenue, although foreign countries have followed the plan.

Stamp tax

In the collection of the internal revenue the attempt is made to make the manufacturer pay the tax automatically. Hence there were elaborate rules and regulations concerning the conduct of distilleries and breweries and tobacco manufactories, requiring certain methods of operation and accounting which must be open at all times to the inspection of the collector. The tax is ordinarily paid by stamps which must be affixed to the package containing the taxed articles, hence the collector, knowing the capacity of the plant, can readily detect fraud by noting the amount of stamps purchased. The affixing of stamps upon receipts and checks was enforced by the provision that without such stamps the instrument would have no legal value.

Income tax

The income and corporation taxes are recent experiments and are collected by the collectors of internal revenue. During the

Civil War period an income tax was levied and its legality was sustained by the courts, but when a new law was passed, the court, in 1895, held that many features of it were unconstitutional.

Corporation tax

To the tariff act of 1909 was added a tax on the net incomes over $5000 of all corporations engaged in business for profit. This tax has proved not merely a good revenue measure[1] but has enabled the government to gain information concerning a class of corporations which public opinion now regards with suspicion.

Income tax of 1913

In 1913 an amendment to the Constitution made legal the collection of income taxes from every source, and in the tariff act of that year a progressive tax was laid upon incomes over $3000, with certain exemptions. This tax began at the rate of 1 per cent upon incomes of $3000, while those over $20,000, $50,000, $75,000, $100,000, $250,000, and $500,000 were subject to an additional tax of 1, 2, 3, 4, 5, and 6 per cent, respectively. Another novel feature of the law required the collection of the tax at its "source." By this provision all persons or corporations paying rent, interest, wages, and so forth, must make the proper deductions required by the law. The novelty of this method of collection and the obscurity of some of the regulations of the department if not of the law itself aroused considerable opposition when it was first put in force. Nevertheless, it has proved a good revenue producer, yielding in 1913–1914, $28,000,000, and in 1914–1915, $41,000,000.

The Emergency Revenue Act, 1914

With the outbreak of the European War it became necessary for the United States to increase its revenue. Consequently, in 1914 an Emergency Revenue Act was passed, which increased the taxes on beer and certain wines and on tobacco; laid special taxes upon bankers, brokers, and commission merchants, and proprietors of public amusements; levied a variety of stamp taxes on business transactions and upon telephone and telegraph messages, and freight and express receipts and Pullman fares; and a stamp tax upon chewing gum and toilet articles. About $52,000,000 additional revenue was thus secured. This act was continued by joint resolution of Congress of December 17, 1915, until the close of 1916. In September of that year a new revenue act was passed, the chief features of which were increases upon the former taxes and certain special taxes, the most important of which were the estate tax of from 1 to 10 per cent and an excise tax of 12½ per cent above the income tax upon manufacturers of munitions. It has been held that "The chief feature of the law, however, was the increase in the income tax: the normal rate being raised to 2 per cent and the scale of progression being made sharper." [1]

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[1] In 1915, $39,000,000; 1916, $57,000,000; 1917, $180,000,000.

The War Revenue Act, 1917

In March, 1917, the excess profit taxes and the inheritance taxes were increased, and in October the War Revenue Act was passed. In addition to the special taxes already discussed the important features were the additions to the income tax and the excess profits tax.

Income tax

The normal income tax was increased to 4 per cent and the exemption lowered to $1000 for single persons and $2000 for married. The surtaxes were also increased materially. "The result is that the maximum rate is now 67 per cent, that is, 2 per cent old normal tax, 2 per cent supplementary normal tax, 13 per cent old additional tax and 50 per cent new additional tax. . . . Never before, in the annals of civilization, has an attempt been made to take as much as two thirds of a man's income by taxation." [2]

Excess profits tax

The excess profits tax [3] is a tax not upon persons or things but upon business. It applies not simply to war profits but to profits from all business. The normal amount of $3000 was exempted for corporations together with an amount equal to the percentage of the invested capital represented by the average annual income during the pre-war period (1911–1914), provided that this percentage shall in no case be less than 7 nor more than 9 per cent of the capital. If the business was not in existence during those years, the deduction was fixed at 8 per cent. It is described by Professor Seligman as follows:

> From this base line of normal profits are computed the excess profits, the tax rising progressively with the excess, being fixed at 20 per cent on the excess profits up to 15 per cent; 35 per cent on the excess from

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[1] Professor E. R. Seligman, "The War Revenue Act," in *Political Science Quarterly*, Vol. XXXIII, p. 3. See also p. 37 for a comparative table.

[2] Ibid. p. 18.

[3] Ibid. pp. 24–31.

15 to 20 per cent; 35 per cent on the excess from 20 to 25 per cent; 45 per cent on the excess from 25 to 33 per cent; and 60 per cent on the excess profits over 33 per cent.[1]

Government depositories

All the revenue of the United States is deposited either in the treasury at Washington, or in the subtreasuries, or in banks designated as government depositories. In 1791 the Bank of the United States was chartered, a private corporation in which the government was represented, which had the practical monopoly of the government business. A second bank, chartered in 1816, became the object of political attack by Jackson and was destroyed by the so-called "removal of government deposits." In 1840 an act was passed establishing a treasury at Washington and subtreasuries in other parts of the country. This act was repealed in 1841 but reenacted in 1846 and modified in 1861 and 1864 so that certain banks became government depositories. By the act of 1913 the government funds are deposited in the Federal Reserve Banks, subject to check by the government.

POWER TO BORROW MONEY AND TO COIN MONEY

How Congress borrows money

Congress may also borrow money upon the credit of the United States.[2] In one of the early drafts of the Constitution this clause included the words "and emit bills of credit." These, however, were stricken out, not because it was intended to deny such power to Congress, but rather because it was assumed that Congress possessed this power. In general, Congress has borrowed money by issuing bonds and short-term notes, usually bearing interest. These are sold subject to redemption by the government either at some specified date or before a certain date at the pleasure of the government. Between the years 1861 and 1865 the debt of the United States was increased by over two billion dollars by this means. Large as these figures seem, they were surpassed in the World War. Twenty-one billion dollars of bonds were issued in addition to treasury certificates. It should be remembered, however, that eight billions were advanced to the Allies, which materially reduced the net bonded debt.

Bonds, short-term notes

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[1] For criticism see Professor E. R. Seligman, "The War Revenue Act," in *Political Science Quarterly*, Vol. XXXIII, pp. 28–32.

[2] The Constitution of the United States, Article I, Sect. viii, clause 2.

Paper money during the Civil War

During the Civil War Congress resorted to the issue of bills of credit, or paper money. By three acts passed between 1861 and 1863, four hundred and fifty million dollars of this currency was authorized and in 1864 about four hundred and fifty million dollars was actually issued. The power of Congress to issue these notes was never questioned. However, Congress went further and made these notes legal tender for private debts whether contracted before or after the issuance of these notes. Since the notes depreciated rapidly it was theoretically possible in November, 1864, for a debtor to satisfy a claim of one hundred dollars by tendering "greenbacks," the market value of which was only forty-three dollars. The constitutionality of this act was denied by the Supreme Court in 1870 [1] but later affirmed in 1871.[2]

"Greenbacks"

Between the two decisions two new justices had been added to the court. Even with these changes the court upheld the constitutionality of the law by a majority of only one. Its reasoning was as follows:

Grounds of legal-tender decisions

> We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage act or to multiples thereof.

Inherent sovereignty, 1871

This conclusion was reached by a construction of the Constitution which comes very close to the theory of "inherent sovereignty," which has since been denied by the court. In 1883 the court again affirmed the constitutionality of the power, deriving it from the aggregate of financial powers granted to Congress, and finding that giving to the notes the quality of legal tender was " . . . an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, ' necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.' " [3]

Elastic clause, 1883

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[1] *Hepburn* v. *Griswold*, 8 Wall. 603

[2] *Knox* v *Lee*, 12 Wall 457, 553.

[3] *Julliard* v *Greenman*, 110 U. S 421, 450

Power to coin money

Inseparably connected with the power to levy taxes and borrow money are the grants to Congress of the power "to coin money and regulate the value thereof . . ."[1] and "to provide for the punishment of counterfeiting the securities and current coin of the United States."[2] There have been few constitutional questions concerning these two grants. In fact, the power to punish counterfeiting was hardly necessary and might properly have been derived either from the right to coin money or to pass laws necessary for the executing of this right. The right to coin money, including as it does the right to fix the value, gives Congress undoubted power to determine what coins shall be considered legal tender. But whether Congress can give to that which has no intrinsic value a legal-tender value was one of the questions considered in the legal-tender cases just discussed, and this section was one of the many invoked by the court in producing the aggregate power which the court found sufficient to allow Congress to issue bills of credit having the character of legal tender.

Congress protected in these powers by prohibitions on states

Congress is furthermore protected in its exercise of these powers by prohibitions upon the states.[3] Not until 1830 was the court called upon to decide judicially what a bill of credit was. In that case Missouri had issued interest-bearing certificates in denominations from ten dollars to fifty cents, and made them receivable for the discharge of taxes and payment of debts due the state. In his opinion Marshall thus defined his conception of a bill of credit:

Marshall's definition of a bill of credit

> In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which the state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed

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[1] The Constitution of the United States, Article I, Sect. viii, clause 5

[2] Ibid. Article I, Sect. viii, clause 6.

[3] No State shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; . . . — Article I, Sect. x, clause 1

> for such purposes, in common language, denominated "bills of credit." To "emit bills of credit" conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purpose, as money, which paper is redeemable at a future day.

And these bills are equally illegal whether made legal tender or not. The majority of the court thus condemned the Missouri law as an attempt to do the very thing which Marshall had declared was forbidden.[1]

After the death of Marshall the court under Taney somewhat modified this strict definition of "a bill of credit." Kentucky had chartered a bank of which the state was the sole shareholder, with power to issue notes payable to the bearer on demand, designated to circulate as money. This proceeding was upheld by the majority of the court according to the following reasoning:

Later modification

> To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and designed to circulate as money. It must be a paper which circulates on the credit of the state; and so received and used in the ordinary business of life.
>
> The individual or committee who issue the bill must have the power to bind the state; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a state cannot emit.[2]

The fact that the state was the sole stockholder of the bank made no difference to the mind of the court; on the contrary, by becoming a partner in the enterprise it divested itself of some of its sovereignty. Later decisions follow out this line of reasoning.

THE CURRENCY

Kinds of currency

The currency of the United States consists of two classes, coin and paper. The coins of the United States are manufactured at the mints, at Philadelphia, San Francisco, Denver, and New Orleans, supervised by a Director of the Mint. Until 1873 both gold and silver were coined at varying ratios; that year, however, the coinage of silver dollars was stopped. In

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[1] *Craig* v. *Missouri*, 4 Pet. 410, 431, 432

[2] *Briscoe* v. *Bank of Kentucky*, 11 Pet. 258.

Coin

1878 a law was passed requiring the purchase and coinage of not less than two million dollars' worth of silver each month, while in 1890 this was amended to require the purchase of not less than four million five hundred thousand ounces of silver a month, with provision for the coinage as needed. As the relative value of silver and gold had declined and the government ratio remained the same, these silver dollars had a fictitious value dependent upon the confidence of the public in the power of the government to redeem them in gold. Owing to the crisis of 1893 the law requiring the purchase of silver was repealed. In 1900 the question was settled by the passage of an act making it the duty of the Secretary of the Treasury to keep all kinds of money on a parity with gold. The reserve was established at one hundred and fifty million dollars, and it was the duty of the Secretary to sell bonds when this fell below one hundred million.[1] In addition to the silver dollars there are in circulation other coins of purely fictitious value, the so-called fractional currency: half dollars, quarters, dimes, five-cent pieces, and cents. These are not legal tender for large amounts, and the total amount is so small that they threaten the security of the system to a very slight degree. The other coins are gold—double eagles or twenty-dollar pieces, eagles or ten-dollar pieces, half eagles or five-dollar pieces, and quarter eagles valued at two dollars and a half. These have an actual market value equal to their face value.

Paper:

(1) Greenbacks

The paper currency of the United States may be considered in three classes: government notes, certificates of coin or bullion, and bank notes. The government notes, the "greenbacks," were issued during the Civil War and are purely fiat money, given a legal-tender value by legislation and upheld by the court. There were over four hundred and fifty million dollars authorized during the war, of which about one hundred million were retired before such retirement was prohibited by legislation. The laws of 1878 and 1890 requiring the purchase of silver could not keep coins in circulation, hence silver certificates were issued, nominally secured by the coined silver in the treasury. After 1890 little silver bullion was coined, and treasury notes were issued against the uncoined bullion stored in the treasury. These,

(2) Silver certificates

(3) Treasury notes

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[1] U S Stat at Large, Vol XXXI, p. 45.

like silver coins and greenbacks, depend for their value upon the power of the government to redeem them. Custom had fixed the sum of one hundred million dollars in gold as a reserve with which the treasury might meet these obligations. In 1893, however, the continual decline in relative value of silver and the diminishing revenue of the government caused anxiety upon the part of the public as to the government's power to maintain this reserve and redeem the increasing charge against it. The Secretary of the Treasury was forced to sell bonds in order to maintain the reserve; panic resulted, and finally the Silver Purchase Act was repealed, the redemption fund increased to one hundred and fifty million dollars, and authority was given the Secretary of the Treasury to sell bonds whenever this fund fell below one hundred million dollars.

(4) National bank notes secured by United States bonds

The third kind of currency in circulation in the United States is known as national bank notes. These are the product of the national banking system established during the Civil War. This system was designed for two purposes: to give a market for the sale of United States bonds, and to restrict the circulation of the notes of state banks. To insure the latter, a tax of 10 per cent was placed upon all notes issued by state banks. The national banking system, which with few changes was in operation from 1863 to 1914, gave the country a safe system of bank notes, and the government a ready market at a premium for its securities. It did not, however, fulfill the purposes of an ideal banking system inasmuch as its currency was inelastic, its reserve requirements immobile, and its use to the government in its financial operations of little value.

THE FEDERAL RESERVE BANKING SYSTEM

Federal Reserve Banking System:

(1) Regional banks

In 1913 a statute establishing a new banking system was put in operation. The system attempts to accomplish the following things: (1) Through arranging the banks of the country into groups, each dominated by a reserve bank owned by the banks within the district, to allow each bank to benefit by the reserves accumulated by all the banks within the district. The amount of reserves each bank and the regional reserve banks must maintain is fixed by law, although the Federal Reserve Board, which has general oversight of the system, may under certain conditions allow the banks to maintain reserves of smaller amounts by paying a graduated tax. The Federal Reserve Board also serves to connect the various regional reserve banks into one system.

(2) Discount provisions

(2) The provisions regarding discount are made more elastic and allow the banks to receive, discount, and rediscount commercial paper of much more varied character than under the old system.

(3) Notes based on currency, bonds, and commercial paper

(3) Instead of bank notes issued upon the security of government bonds bought in the market, the banks are allowed to issue notes, secured by reserves consisting of currency, securities, and commercial paper. These new notes are secured by the bank issuing them, the regional banks, and by a reserve in the United States Treasury. The aim is to provide some element of elasticity dependent upon the needs of business rather than upon the price of bonds.

(4) Government funds deposited in Federal Reserve banks

(4) Proper facilities are provided for transacting the government business. The old system allowed the Secretary of the Treasury to designate certain national banks as government depositories, but the greater part of the funds of the treasury were withdrawn from circulation and held either in the treasury or the various subtreasuries, where the government lost interest upon them. Under the new system the government funds will be deposited in the Federal Reserve banks, and the government, like any other depositor, will pay by check, while the deposits may be used for reserves and security.

(5) Federal Reserve Board

(5) Government supervision of the closest sort is provided by the establishment of a Federal Reserve Board, consisting of the Secretary of the Treasury, and the Comptroller of the Currency, ex officio, and five others appointed for the terms of ten years. The evident theory of the system is to allow greater freedom by cooperation and government supervision.

Comptroller of the Currency

The Comptroller of the Currency is a semi-independent officer and has charge of the application of the banking laws. All national banks are required to report to his office several times a year, and through bank examiners he conducts frequent examinations of their resources. He is given power to close any bank or may force it into bankruptcy.

METHOD OF APPROPRIATING MONEY[1]

Committee on Ways and Means formerly controlled all financial legislation

Until 1823 one committee, the Committee on Ways and Means, prepared a single appropriation bill for all the needs of the government. As this committee was also intrusted with the preparation of the revenue bills, attention could be given to the balancing of the revenues and expenditures. In 1823 a separate bill for fortifications was passed, and from that time on the number of appropriation bills has increased. At present there are usually thirteen regular appropriation bills besides the deficiency appropriation bill, which passes quite as regularly as the other bills. Until 1865 the Committee on Ways and Means continued to control the amount of the appropriations in these bills. Other committees might authorize but the Committee on Ways and Means alone could appropriate. Thus it monopolized the control of legislation and arrogated to itself the right to pass upon the work of other committees. It controlled finance, it is true, and it doubtless was the means of enforcing some degree of economy and of keeping the expenditures in some relation to the revenues. But its all-pervading functions exposed it to attacks, some of which were perhaps justified. A single committee of seven or nine men, no matter how able, chosen for their ability to frame revenue legislation and to control finance, is hardly capable of passing upon the relative merits of military or naval programs or of determining the policy to be pursued by the agricultural department. Yet this is just what the Committee on Ways and Means attempted to do. Not content with exercising its expert knowledge in finance it claimed to possess the expert knowledge acquired by the other committees. In this respect the criticism of the committee and the attack upon its activities was perhaps justified. The development of the government and the expansion of its activities made it physically impossible for a single committee to control the whole field.

Attacks on its power

Other elements, however, were needed to make the attack successful. These were not wanting in the jealousy of the chairmen

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[1] H. J. Ford, The Cost of Our National Government; Speeches by Congressmen Fitzgerald, Sherley, and Tawney in Congressional Record, June 24, 1913, Vol. L, Part III, pp. 2154–2162; February 28, 1913, Vol. XLIX, Part V, pp. 4349–4355.

The Committee on Appropriations

of other committees and the personal rivalries in the House. In 1865 the committee's assailants succeeded in having a Committee on Appropriations established. Had the process of distribution stopped here and had the Committee on Appropriations been constituted in part an ex-officio committee, as was later suggested, it might have been possible to defend this action. But the new committee was appointed in the same way as the other committees of the House, and attempted to exercise the same sort of control as the Committee on Ways and Means had claimed. There were thus the same criticisms and the same arguments against the power of the Committee on Appropriations as had been brought against the Committee on Ways and Means, and the same personal motives were brought into play. In 1877 this attack was in its turn successful in part, and in 1885 five committees[1] were given the power to report appropriation bills with the same privileges as the Committee on Appropriations. The process of disintegration has continued, until now eight different committees report the fourteen appropriation bills which each Congress has to pass.

Other appropriating committees

Lack of coördination in financial legislation not fatal, because of national prosperity and surplus

Both theoretically and practically this course should prove fatal to economy and efficiency. Such has been the case. Theoretically it is preposterous to vest in the hands of one committee, that on Ways and Means, the raising of the revenue, and to scatter among eight unrelated committees in the House and an almost equal number in the Senate the spending of the revenue. It would seem impossible to establish any sort of balance between the revenue and expenditures, and it would seem that financial disaster was inevitable. This has been escaped for two reasons. In the first place from 1860 to 1912, with the exception of the years 1894 to 1897, the revenue has been raised not for financial but for economic purposes. Protection was an economic theory and produced a surplus. This surplus was so great that not even such a faulty system of finance and extravagant appropriations could prevent the reduction of the bonded debt of the United States more rapidly than financiers and bankers deemed wise. Moreover, with the exception of short periods of depression the country has enjoyed prosperity not experienced by other nations. The national wealth has increased even more rapidly than national extravagance. Thus, when one Congress was reproached as a "billion-dollar Congress" the Speaker retorted that it was a billion-dollar country.

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[1] The Committees on Foreign, Military, Naval, and Indian Affairs, and the Committee on Post Offices and Post Roads.

Increased military expenditures

From the last years of the nineteenth century a different condition has existed. The Spanish-American War and the consequent changed position of the United States in world affairs entailed large appropriations. The demand for an increased navy and a larger army caused the appropriations for these branches to increase at a prodigious rate.[1]

Transfer of state functions to federal government

In addition there was a growing tendency to lay upon the federal government many functions which had been or should be performed by the states. Thus the federal administration of the Pure Food Law, made necessary by the laxity of the authorities of certain states, took three millions annually. The establishment of the Bureau of Mines, which operates in only a fraction of the states, required the establishment of another bureau, which makes increasing demands upon the federal treasury. The whole movement towards conservation, and the huge appropriations carried in the Agricultural Bill, and the shocking extravagance of the River and Harbor and Public Buildings bills are only a few examples which show the increasing demands upon the treasury for the performance of functions naturally belonging to the states. Thus, while the average annual expenditure from 1878 to 1885 was about two hundred and ninety-four million dollars, the average from 1898 to 1905 was six hundred and fifty million dollars, and the grand total of all annual and permanent appropriations for 1909 was over a billion.[2]

The appropriation of such vast sums should be according to some system which would require some connection between the revenues and expenditures and fix the responsibility somewhere or upon someone. Such, however, is not the case.

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[1] In 1897 these appropriations amounted to about sixty-one million dollars, in 1910 to over two hundred and forty-one millions, an increase of 300 per cent.

[2] The total appropriation made by Congress was, in 1890, more than two hundred and eighteen million dollars; in 1900, more than four hundred and sixty millions; in 1910, nearly six hundred and fifty millions; and in 1916, six hundred and seventy-eight millions

SOURCES OF DEMANDS FOR APPROPRIATIONS[1]

Annual estimates of the departments

1. The first demand for appropriations comes from the estimates transmitted by the Secretary of the Treasury at the beginning of each session of Congress. By statute each executive department must transmit to the Secretary of the Treasury, on or before the fifteenth of October, the estimates for his department. The Secretary of the Treasury is then required to arrange these estimates so that they conform to the last appropriation act, and transmit the same to Congress. In so doing he acts in a purely ministerial capacity and has no power to alter the estimates given him by the heads of the various departments.[2] These estimates thus lack the strength which a well-matured and correlated budget would have. Each stands upon its own independent basis. Therefore each department, fearing it will not obtain as much as it desires, is tempted to ask for more than it can economically use.[3] In 1909 some improvement was made by the passage of a statute[4] which directed the Secretary of the Treasury to transmit the estimates to the president whenever they should exceed the estimated revenue, in order that the president might advise Congress how the estimates might be reduced with the least detriment to the service. President Taft went even further and directed the heads of his departments to reduce the estimates to the lowest possible figures. This movement may be the beginning, small though it is, of a better system.

Supplementary estimates

2. A second set of estimates transmitted by the Secretary of the Treasury are known as the supplementary estimates. These are sent to Congress in an almost steady stream throughout the session. They include both large and small amounts, from important changes in policy, like Secretary McAdoo's revised estimates

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[1] See H J Ford, The Cost of our National Government, pp. 19 et seq

[2] When John Sherman was Secretary of the Treasury he attempted to obtain such authority, in order to make the estimates correspond with estimated revenue, but in this he was unsuccessful. No cabinet officer would yield to a colleague, nominally of equal rank, the power to curtail his estimates and determine the amount he thought necessary for the operation of his department.

[3] See statement of Congressman Tawney, chairman of the Committee on Appropriations, in H. J Ford, The Cost of our National Government, Appendix B

[4] March 4, 1909, Stat. at Large, Vol XXXV, p 1027, Sect 7

in 1917, which increased those he previously had sent by nearly ten billions, to three dollars and fifty cents for a tire of a bicycle used by a messenger of the Court of Claims in 1908.

Judgments of the Court of Claims

3. The third demand for appropriations comes from the judgments of the Court of Claims, which are transmitted by the clerk of that court. The Court of Claims unlike other courts has no authority to enforce its judgments and must depend upon congressional appropriations. These cannot be estimated but depend upon the decision of the cases before the court.

Surveys for rivers and harbors

4. A demand for appropriations also comes from the army engineers who have been directed by concurrent resolutions to make surveys to serve as the foundation for future appropriations for the improvement of rivers and harbors. Since these surveys are ordered by concurrent instead of joint resolutions, they are not passed upon by the president, nor can they be estimated for by any department, nor are they included in the estimates transmitted by the Secretary of the Treasury.

Expenditures authorized by current legislation

5. The appropriating committees are also expected to provide for the expenditures authorized during the session. These expenses are always uncertain and cannot be estimated for. They include not merely the cost of carrying on the government as authorized by law but also appropriations for the enlargement of the various departments and the extension of the work in accordance with the legislation of Congress. Sometimes a department recommends certain legislation for the sake of economy and prepares its estimates accordingly, but Congress may refuse to make the necessary changes in the law. Thus the estimates for the Post-Office Department for 1916 were over nine million dollars less than for the previous year. But Congress refused the necessary authority to make the changes asked for and appropriated twenty-seven millions more than had been estimated. In addition, numerous bills of all sorts are introduced authorizing expenditures. In some instances they are gathered together in great omnibus bills, " pork barrels " as they are called, in which each member is supposed to obtain an appropriation for his district. The more notorious of these bills are the River and Harbor Bills, the Pension Bill, and the Public Building Bill.

Impossibility of correlation and control

It is impossible to get any correlation or control, or to make anyone responsible for these estimates coming from such various sources. Each department, each bureau, each locality, each individual is allowed to make his demand upon Congress and to trust to political influence to obtain some portion of the amount demanded.

PROCEDURE ON APPROPRIATION BILLS

Committee hearings

Bad as the system of estimating is, the system of considering these estimates is even worse. The Committee on Appropriations itself is responsible for six bills.[1] The seven other committees having power to report appropriations frame their own bills independently alike of the Committee on Ways and Means and the Committee on Appropriations. It is the practice of the various committees to call the heads of the departments or experts from each department before them and to inquire concerning the necessities of the estimates. These hearings are printed and serve as a guide not merely for the committee but for the members when the bill is considered in the House. It is almost certain that the committee will reduce the amount asked for; in fact, the departments make allowance for this in their estimates. Thus, the estimates for 1909 amounted to over eight hundred and forty-three million dollars, and the committee reported to the House seven hundred and forty million dollars — a large reduction seemingly in the interest of economy.

Reduction of departmental estimates

Consideration by the House

The chairmen of the committees reporting the bills to the House explain the general principles, while the senior minority member criticizes them, usually on the score of extravagance. Several hours of general debate are allotted before consideration in the Committee of the Whole. Generally this time is occupied not in debate but in making political speeches on any subject which a congressman wishes to discuss. In the Committee of the Whole the bills are considered under the five-minute rule, and each clause is subject to discussion and amendment. It is here that the champions of economy suffer the most. The president may direct a reduction in the estimates, and the departments may comply; the appropriating committees may still further reduce these amounts, but the House and Senate are almost always sure to increase them. No one member likes to incur the hostility of another by voting against the appropriation in which that member is interested. Too often members agree to use their influence to help each other obtain their desires. This is called "log rolling," a practice most difficult to check and impossible to prevent. Desire for political influence and fear of reprisals keep the members silent. Thus the seven hundred and forty million dollars reported to the House in 1909 had increased to seven hundred and forty-three million dollars when it finally passed the House.

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[1] Legislative, Executive, and Judicial; District of Columbia Appropriations; Fortifications; Pensions; Sundry Civil Appropriations; all deficiency bills.

Committee recommendations increased

"Log rolling"

The bill then goes to the Senate committee which has jurisdiction over it. The departments and the individuals who have suffered cuts at the hands of the House make their appeal to the Senate committees. The committees of the Senate are usually generous. Thus, in 1909 the seven hundred and forty-three million dollars appropriated by the House was reported to the Senate as eight hundred and four million dollars. This was only about forty million less than was asked for by the estimates, but sixty-four million more than was reported to the House and over sixty million more than was granted by the House. When the bills are considered in the Senate even the generous amounts reported by the committees are usually increased. There are several reasons for this. The Senate, owing to the long terms of its members, is not so sensitive to immediate public criticism, and hence is apt to be more generous. Its rules, also, allowing for unlimited debate, give opportunity for an importunate senator to obtain his demand under the threat of wrecking the whole bill. On the contrary, in a few exceptional cases this power of unlimited debate has led to a reduction or a defeat of the measure. Thus eight hundred and four million dollars, which was reported, grew to eight hundred and seventeen million dollars in the passage through the Senate. In the conference which is necessary to reconcile the differences between the Houses, the Senate usually gains a large portion of the increases it has asked for. This is for two reasons. The first is found in the nature of the Senate rules, which, as just pointed out, in allowing for

Consideration by the Senate

Senate committees generous

Recommendations still further increased in the Senate

In conference the House generally accepts Senate increases

unlimited debate give the opportunity to wreck the measure, especially if the end of the session be near. The second reason may be suspected to be the controlling one for the surrender of the House. Economy is unpopular politically, and it may be suspected that even some of its strongest advocates in the House are willing if not glad to allow some of the senatorial increases. Their yielding frequently enables them to use appropriations to strengthen their position in their districts.

Evils of the present system

Viewing the system as a whole it seems an almost unmitigatedly bad one. (1) There is no responsibility for a balance (*a*) between the revenues and expenditures nor (*b*) between the various departments. (2) There is no compulsion exerted anywhere on the side of economy; and (3) there is everywhere every incentive for extravagance. As Representative Gillett said in 1905, "There is no selfish interest on the side of economy while every member has pressure from home for financial expenditure."

Suggested reforms

There are various methods by which this procedure might be reformed. But until 1909 little serious attention was given to it, and few attempts were made to provide remedies. Protests of the chairmen of the Committee on Appropriations and sarcastic remarks by the minority members were the only signs of interest. Senators and representatives alike were more interested in improving their political positions than in economy. Three methods, however, have been seriously discussed and one has been attempted. These are the executive budget, a congressional committee on revenues and expenditures, and a single committee on appropriations.

ATTEMPTS AT REFORM

The Commission of Economy and Efficiency

1. *Plans for an executive budget.*[1] In 1909 President Taft asked for and received the sum of one hundred thousand dollars for the purpose of inquiring into the operation of executive departments. The Commission of Economy and Efficiency was organized, which prepared new forms for the estimates so that they should conform to the budget idea. This commission reported the need of and advised the adoption of an executive

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[1] F. A. Cleveland, "The Federal Budget," in *Academy of Political Science Proceedings*, Vol. III, No. 2, p. 117.

budget.[1] The commission also recommended that the executive should prepare and submit to Congress each year a prospectus of the work to be undertaken, with an estimate of the cost. This the president proceeded to do. Unfortunately the majority of the House was opposed to the president politically, while the Senate was controlled by a coalition of Democrats and Progressives. In order to thwart the president, who might obtain some political advantage from his reform, Congress inserted in the Legislative, Executive, and Judicial Appropriation Bill the proviso that the estimates of the appropriation for the expenses of the government should be prepared and submitted to Congress "only in the form and at the time now required by law, and in no other form and at no other time." The law required that the Secretary of the Treasury should arrange the estimates as the appropriations had been arranged in the previous appropriation bill. Thus the majority hoped to head off the attempt to force an executive budget.

Failure of budget movement under President Taft

Nevertheless, President Taft believed it was within his prerogative to order the departments to prepare estimates to be submitted to him as he should direct. Certainly he had power to submit any message on any subject at any time to Congress. Unfortunately, the new estimates were not ready until about February and were not submitted to Congress until the end of the month. They were referred to the Committee on Appropriations, which had finished its work and ordered them to be printed. Five days later President Taft retired.

Advantages of budget system

Theoretically, the budget system is the only possible one. The United States is the only great nation which is operated without a budget. It would seem axiomatic that the appropriating body should have the record of the past and the plans and estimates of the future, before it could ever hope either to fix the revenue or to grant the appropriations. But, as has been shown, taxes are usually levied for economic rather than financial reasons, and appropriations are made to promote personal or party advantage rather than the efficiency of the government. In order to operate a budget successfully it would be necessary to alter most radically the political habits and methods of most public men.[1] It should be pointed out, moreover, that in England and France the second chambers do not alter money bills, while in Switzerland and Germany the executive is listened to with more respect. It is almost beyond the bounds of imagination to think of the Senate relinquishing its constitutional right to amend and alter both appropriating and revenue bills. Nor is it altogether likely that Congress, with its present system of committees, will enthusiastically welcome a budget prepared by the executive. Such a one might be submitted, but it would be subjected to congressional alteration until its original form would be unrecognizable. Nevertheless, with the constantly increasing expenditures, greatly augmented by the World War, Congress has been driven to unwilling regeneration, and the House in 1919 passed and sent to the Senate a budget bill. In the meantime the budget idea stands as a counsel of perfection which has been successfully operated in other countries.

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[1] House Document 854, 62d Cong., 2d Sess., p. 575. Transmitted by a special message of the president, June 27, 1912.

A committee composed of representatives of appropriating committees to apportion revenue to committees

2. *A committee on estimates and expenditures.*[2] In 1913 Representative Sherley proposed that the chairmen and three ranking majority members and the ranking minority members of the Committee on Ways and Means and the Committee on Appropriations, together with the chairmen and ranking minority members of the Committees on Rules, Agriculture, Foreign, Military, Naval, and Indian Affairs, Post Office and Post Roads, and Rivers and Harbors, form a committee on estimates and expenditures. This committee should report to the House the probable amount of revenue available and apportion it to the several committees empowered to report appropriations. When this report should be accepted by the House it was to become binding upon all committees, and any committee exceeding the amount could be forced to reconsider its appropriations upon a point of order raised by a single member. There are manifest advantages in this proposal. It joins in one committee representatives of the revenue-raising and revenue-spending committees. It thus has

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[1] See a most suggestive analysis of political conditions in H. J. Ford, The Cost of our National Government, chaps vi, vii.

[2] See an address by Representative Sherley, February 28, 1913, in Congressional Record, Vol. XLIX, Part V, pp. 4349-4355.

one of the elements sought in a budget system. A second feature sought in a budget system is found in that it compels a survey by a single committee of the needs of all the departments and all the appropriations likely to be made. Being an ex-officio committee it is superior to the old single Committee on Appropriations as it was constituted from 1865 to 1885. Furthermore, it submits to the House not individual appropriations but a comprehensive scheme for appropriations. The House votes totals rather than details, thus doing away with some of the danger of "log rolling." Finally, it leaves to committees which presumably are better informed the distribution of the amount allotted to them. In spite of the excellences of this scheme and the fact that it was received with loud applause, nothing has been done to make it effective.

Modification of former single Appropriation Committee

3. *A single committee on appropriations.*[1] Later, in the same year, Representative Fitzgerald, chairman of the Committee on Appropriations, made an elaborate address in which he reviewed the expenditures and the history of the present system and proposed alterations. His idea was to return to the single committee of 1865 to 1885, increasing it to include the chairmen of the Committees on Naval, Military, Foreign, and Indian Affairs, Post Office and Post Roads, and Agriculture. To this committee was to be given the appropriation of the revenue for the support of the government, including the improvement of rivers and harbors. No appropriation should be made except in a general appropriation bill, and no appropriation in the bill should be in order unless it was previously authorized by law. Any Senate amendment obnoxious to this rule should not be agreed to on the part of the managers of the House Conference Committees unless specific authority should be given by a separate vote on each amendment. In his address Mr. Fitzgerald criticized both the budget scheme, asserting that it was unnecessary, and plans for a committee on estimates and expenditures, holding that the lack of time made it impractical. He believed that his plan had the merits of concentration, dispatch, and coordination. He, moreover, pointed out

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[1] See address by Representative Fitzgerald, June 24, 1913, in Congressional Record, Vol L, Part III, pp. 2154–2162.

that, although he was depriving various committees of their much-prized power to report appropriations, he was still leaving them valuable and useful functions. His scheme has the merit that it contains less novelty than the other plans for reform and is but a modification of a system which was in operation for twenty years. It lacks, however, the advantages of the Taft budget plan and the Sherley committee plan in that it fails to coordinate the revenue-producing and revenue-spending committees. Furthermore, it requires a greater sacrifice of political influence from the other committees than either of the other plans. It would undoubtedly make for economy, and at the same time raise the Committee on Appropriations to a commanding position politically, making its chairman the most important man in the House.

PAYMENTS AND AUDIT

Appropriations permanent, continuing, and annual

Payments are made only as the result of appropriations of Congress. These statutes may be classified as (1) permanent, — such as appropriations for the interest and principal of the public debt; (2) continuing, — such as those of the construction of public works, like the Panama Canal and some river and harbor improvements; and (3) annual, — such as appropriation bills for all branches of the government service. The payments are made by the Treasurer of the United States and subtreasurers or their agents upon warrants of the proper disbursing officers approved by the proper auditors and comptrollers.

Audit

The system of auditing is involved and technical. In general the departments having the greatest expenditures[1] are assigned auditors, while a single auditor serves for the expenses of the other departments where the expenditures are not so heavy. It is the duty of these auditors to pass upon the warrants of the disbursing officers and see that the account or claim against the government is submitted in proper form. Appeals from their decisions lie to the Comptroller of the Treasury. The Comptroller of the Treasury, although attached to the treasury department, is appointed by the president and holds a semi-independent

The Comptroller of the Treasury

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[1] Treasury, War, Interior, Navy, and Post Office, although this department is less dependent upon the Secretary of the Treasury than the others.

position of a quasi-judicial character. It is his duty to pass upon all appeals from the decision of the auditors, and to advise the disbursing officers in determining the validity of payments. His decisions are not reviewable by the Secretary of the Treasury, but appeal may be entertained by the appropriate court of law. Within his province the Comptroller is independent even of the Attorney-General upon questions of law. Nevertheless, like all officers except the judges, he is liable to removal by the president, and is thus, like them, subject to the directions of the president. His position, although involving judicial duties, is not so carefully protected from political influence as is that of the Comptroller in England, who in the performance of similar duties receives the same protection as is given to the judges.

CHAPTER XIX

THE REGULATION OF COMMERCE

THE POWER TO REGULATE FOREIGN AND INTERSTATE COMMERCE

The government slow to appreciate and use this power

The right to regulate commerce stands second in the list of powers granted to Congress. Indeed, while the right to raise money might possibly be implied, the right to control commerce must depend upon some specific grant. The disastrous experience of the Confederation when both foreign and interstate commerce were at the mercy of state jealousy and avarice convinced the convention of 1787 that national regulation was absolutely essential. Although adopted as the result of a compromise and subject to several restrictions, the power contained in the grant has proved sufficient for the unexpected development and expansion of commerce and industry. The government was slow to appreciate the extent and the significance of this power. It was not until 1824 that the extent of the power was pointed out by the Supreme Court in *Gibbons* v. *Ogden*, and during the next sixty years the grant was more generally invoked to prevent state encroachments than to substantiate federal activity. Not until 1887 did Congress attempt in any comprehensive way to utilize affirmatively the authority given it over interstate commerce, and this attempt was hardly made efficacious until 1906.

Power to regulate commerce limited only by the Constitution

In 1824 Marshall, in his opinion in the case of *Gibbons* v. *Ogden*,[1] pointed out the extent of the power in these words: 'The power to regulate commerce, like all other powers vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

Therefore, no assumed or additional restriction drawn from conditions existent in 1787 or the intent of the convention can

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[1] 9 Wheat 1, 196.

Power not limited by the intent of the framers of the Constitution

limit or control the extent of this power. This was clearly asserted in 1889 when the court used these words: "The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself."[1]

Development of the commercial power

Thus, subject to the restrictions contained in the Constitution itself, Congress has full and absolute power to adopt any means to regulate commerce for any purpose that it shall deem advisable. To illustrate by anticipation, it will be seen that under this clause Congress has not merely checked state interference and provided for equality in transportation, but has utilized this power to accomplish, by federal legislation, economic, industrial, social, and moral reforms. In other words, by means of the authority to regulate commerce Congress has been able to enter the vast field of the police power from which it was otherwise debarred.

What is commerce?

The present conception of the term "commerce" is the result of judicial interpretation and definition. From the very early years of the government the court has been liberal in its interpretation of this word. Thus, in 1827, Marshall said, "Commerce is intercourse"; while in 1875 Chief Justice Field gave the following more ample definition:

Marshall's definition

A comprehensive definition of commerce

> Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted.[2]

In 1877 the court thus summarized the constantly increasing application of the term:

Expansion of definition with changing conditions

> The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider, to the stage coach, from the

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[1] *Addyston Pipe and Steel Co* v. *United States*, 175 U.S. 211, 228.

[2] *Welton* v. *Missouri*, 91 U.S 275, 280.

sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.[1]

Messages by telephone and wireless telegraph are also included within this definition, in short, anything that involves transportation of persons or things, tangible or intangible. "Transportation is essential to commerce, or rather it is commerce itself," said the court in *Railroad Co.* v. *Husen*.[2]

Commercial power covers agents and means of commerce as well as thing transported

The regulation of commerce extends not merely to the thing transported and the means by which it is transported but also to the persons engaged in the act of transportation. Thus, not only has the power of Congress to compel the use of safety appliances on railroads been upheld, but legislation concerning the hours of labor and the relations of the employees to the employers have been sustained on the ground that the employers were agencies of commerce. In sustaining the second Employers' Liability Act the court used these words:

> Among the instrumentalities and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.[3]

What is not commerce:

On the other hand, certain well-recognized commercial transactions do not fall within the definition. For example, the court has held that bills of exchange were not commerce, saying:

(1) Bills of exchange

> A bill of exchange is neither an export nor an import. . . . Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a state in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.[4]

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[1] *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U S 1, 9.

[2] 95 U. S. 465, 470.

[3] *Mondous* v *N. Y., N H. & Hart R. R. Co*, 223 U. S 1, 47.

[4] *Nathan* v. *Louisiana*, 8 Howard, 73, 81.

(2) **Insurance**

By a similar reasoning fire insurance, marine insurance, and life insurance have been declared not to be commerce but incidents of commercial transactions. This interpretation is subject, however, to considerable criticism, and is more typical of the nineteenth than the twentieth century.[1]

(3) **Manufacture**

Although commerce is intercourse, transportation, and trade, it does not include manufacture. This was emphatically stated by the court in 1894 as follows:

> ... The fact that an article is manufactured for export to another state does not make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.[2]

THE RELATION BETWEEN THE POWER OF CONGRESS AND THE POWER OF THE STATES TO REGULATE COMMERCE

States control interstate commerce

Although the power to regulate commerce is granted in the widest form, it is not exclusively vested in Congress. The states still may exercise and must exercise some measure of regulation over commerce within their borders. The attitude of the court concerning the extent to which state regulation of commerce may go was clearly summarized by Justice Brown in 1893 as follows:

> The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.
>
> **Exclusive state jurisdiction**
>
> The *first* class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls for the use of the same. . . .

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[1] See W. W. Willoughby, The Constitutional Law of the United States, Vol II, pp. 636–638, with references to other cases

[2] *United States* v. *Knight*, 156 U.S. 1, 13. But see the discussion of the Addyston Pipe decision, p. 507.

Congress has no power to interfere with the police regulations relating exclusively to the internal trade of the states. . . .

Concurrent state and federal jurisdiction

Within the *second* class of cases — those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots: . . . quarantine and inspection laws and the policing of harbors . . . the improvement of navigable channels: . . . the regulation of wharfs, piers, and docks: the construction of dams and bridges across the navigable waters of a state: . . . and the establishment of ferries . . . As a matter of fact, the building of bridges over waters dividing two states, is now usually done by congressional sanction. Under this power the states may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

Exclusive federal jurisdiction

But whenever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the nonaction of Congress indicates its will that such commerce shall be free and untrammeled, and the case falls within the *third* class — of those laws wherein the jurisdiction of Congress is exclusive. . . . Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states.[1]

The police power

The police power of the states with which the court has declared Congress has no right to interfere, have been briefly defined by the court as those powers which "relate to the safety, health, morals and general welfare of the public."[2] More

Extensively defined

extensively the court has said that the police power embraced every law "which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons, or of property of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction."[3]

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[1] *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204, 209, 210 211, 212.

[2] *Lockner* v. *New York*, 198 U.S. 45, 53.

[3] *New York* v. *Milne*, 11 Peters, 102, 139

Bona fide police regulations may affect interstate commerce

Legislation and regulations passed in accord with this power must of necessity frequently touch upon commerce as extensively defined by the court. With the regulation of commerce and trade which is only domestic — intrastate commerce — Congress has no concern. But with the development of commercial intercourse among the states these regulations are almost of necessity bound to interfere indirectly with interstate or foreign commerce. The court has therefore said:

> . . . If the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce.[1]

But as Chief Justice Field said, "there is great difficulty in drawing the line precisely where the commercial power of Congress ends and the power of the state begins."[2]

Limits to police regulations

States have exercised their police powers, and thereby indirectly affected interstate commerce by inspection and quarantine regulations. These regulations have been closely scrutinized by the court. Where they were obviously bona fide inspection laws for the purpose of protecting the inhabitants of the state they have been upheld. But a state has not been allowed "under the guise of exerting its police powers . . . [to] make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states."[3] States therefore have power to prevent the introduction of ". . . articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death. . . . Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life."[4] But this should be clearly remembered:

> It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce,

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[1] *Austin* v *Tennessee*, 179 U S 343, 349

[2] *Bowman* v *Chicago & Northwestern R. R. Co.*, 125 U S 465, 506

[3] *Brimmer* v. *Rebman*, 138 U S 78, 82

[4] *Bowman* v *Chicago & Northwestern R. R Co*, 125 U S 465, 489

> irrespective of its condition and quality merely on account of its intrinsic nature and the injurious consequences of its use or abuse.[1]

Prevention of fraud, however, is within the legitimate scope of the police power. Thus the court upheld a Massachusetts law prohibiting the sale of oleomargarine colored in imitation of butter, upon the ground that it was within the proper exercise of the police power to prevent fraud.[2]

But later, in reviewing its own decisions regarding oleomargarine, the court said:

> In the execution of its police powers we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud, or deception, in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purpose the state cannot absolutely prohibit the introduction within the state of an article of commerce like pure oleomargarine.[3]

State police regulations invalid when they conflict with national legislation

Finally, all or any state legislation passed under its police power becomes invalid when it conflicts with national legislation passed under the commercial power of Congress. Thus, in holding a Texan statute unconstitutional, Justice Brewer said:

> Generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all other reserved powers of the states, is subordinate to those in the terms conferred by the Constitution upon the nation.[4]

When does interstate commerce become intrastate commerce?

A vexed question and one of vital importance to the states is, When does interstate commerce or foreign commerce cease? In other words, When does the act cease to be one under the control of the federal government and become a purely domestic act under state regulation? The court has held that commerce is not simply transportation and importation but also sale. Thus Marshall in an early case said:

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[1] *Bowman* v. *Chicago & Northwestern R. R. Co.*, 125 U S. 488, 489.

[2] *Plumley* v *Massachusetts*, 155 U.S. 461.

[3] *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 14.

[4] *Gulf, Colorado & Santa Fe R R. Co.* v. *Hefley*, 158 U.S. 98, 104.

Marshall held commerce to include sale

> . . . There is no difference, in effect, between a power to prohibit the sale of an article, and the power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. . . . Sale is the object of importation. . . .[1]

Yet, as has been shown, the states retain absolute control over persons and property and acts which are completely within their jurisdiction. Thus it is a matter of everyday observation that the sale of liquor, drugs, tobacco, and other articles is subject to state restriction and even to state prohibition. At what point does this commercial transaction cease to be under the protection of the commerce clause and come under state control? The court has thus answered the question:

The "original package" decision

> It is sufficient for the present to say, generally, that where the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty upon imports to escape the prohibition in the Constitution[2]

From this doctrine of the original package the court has not departed, although it has insisted that such packages be the ones ordinarily used in commerce and not so small as to raise suspicion that they were adopted for the purpose of gaining the protection of the doctrine.[3]

INTERSTATE COMMERCE AND THE IMPORTATION OF INTOXICATING LIQUOR

Effect of "original package" decision

Thus, although a state might prohibit the sale of intoxicating liquors, such could be shipped from another state and sold by the importer in the original packages.[4]

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[1] *Brown* v. *Maryland*, 12 Wheat. 419, 439, 447

[2] Ibid. 12 Wheat. 441.

[3] *May & Co.* v. *New Orleans*, 178 U.S. 496; *Austin* v. *Tennessee*, 179 U.S. 343 See also W. W. Willoughby, The Constitutional Law of the United States, Vol II, pp. 645–650.

[4] "A citizen of one state has the right to import beer into another state and sell it there in its original packages." — *Leisy* v. *Hardin*, 135 U.S 100

The Wilson Law, 1890

In answer to the demands of those states which had prohibited the sale of liquor, Congress in 1890 passed the so-called Wilson Act. By this law all sale of liquor became subject to the police regulations of a state upon arrival in a state. Thus the doctrine of Marshall concerning the sale in original packages was modified. But it is important to notice, however, that the original-package theory still holds good for all articles save liquor. The constitutionality of the Wilson Law was upheld in the case of *In re Rahrer.*[1]

Application of the Wilson Law

The advantages which the cause of prohibition hoped to gain by the Wilson Law were, however, somewhat diminished by the subsequent decisions of the court. For example, the words "upon arrival" have been held to mean the actual consummation of the shipment and not the arrival at the state line. As a result liquors were not subject to state regulation until they had reached their ultimate destination, a fact which increased the expense and diminished the ease of supervision.[2] In 1897, in passing upon the South Carolina Dispensary Law, the court declared: "But the right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of a state law."[3] While in *Adams Express Co.* v. *Iowa*[4] shipments of liquor to be paid for on delivery were held to be beyond the power of the states to prevent or punish. These decisions, chosen from many, show how impossible it was to enforce the ideas of the prohibitionists.

Webb-Kenyon Law, 1913

As a result of the spread of "state-wide" prohibition the demand for legislation which would allow the states to enforce their own laws became overwhelming. Consequently on March 1, 1913, the Webb-Kenyon Law was passed by Congress. By this law it is prohibited to ship or transport into any state, territory, or district of the United States, from any other state, territory, district, or from any foreign country, intoxicating liquors of any kind intended to be received, possessed, or sold either in the original package or otherwise, in violation of any law of such states, territories, or districts.[1] This act was vetoed by President Taft on the ground that it was "a delegation by Congress to the states of the power of regulating interstate commerce in liquors which is vested exclusively in Congress."[2] This veto was overwhelmingly overridden by a large majority in both Houses. The constitutionality of this law was upheld in 1916 when the court said in part:

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[1] 140 U. S. 545.

[2] *Rhodes* v. *Iowa*, 170 U. S. 412.

[3] *Vance* v. *Vandercook Co.*, 170 U. S. 439, 452, 453.

[4] 196 U. S. 147.

The court upholds the Webb-Kenyon Law

> . . . We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation, which is what was done by the Webb-Kenyon Law, making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. . . . Or, in other words . . . that because Congress in adopting a regulation had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the national and local forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution[3]

STATE REGULATION OF BUSINESS

Corporations subject to state regulation

Further examples of the extent to which commerce may be subject to the police power of the states must be noted. A corporation not being a "citizen" in the sense that it is entitled to the privileges and immunities of the citizens of the several states may be prohibited from doing business within a state. Thus it was held in 1868 that a corporation " . . . having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely;

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[1] 37 Stat at Large, p 699; see speech of Senator Root condemning the act, in the Congressional Record, February 10, 1913

[2] Congressional Record, February 28, 1913, Vol XLIX, Part V, p. 4291

[3] *Clark Distilling Co.* v. *Western Maryland R. Co*, 242 U.S 311, 331.

they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." [1]

Corporations may be excluded from "doing business," but not from interstate commerce

However, it should be clearly understood that this merely permits a state to exclude a corporation from "doing business" as a corporation within its borders. No state can prevent a corporation from shipping its products or engaging in interstate commerce; but a state is permitted to regulate, license, tax, or prohibit a foreign corporation from engaging in purely domestic commerce as a corporation. Furthermore, the regulations or restrictions placed upon a foreign corporation must not interfere with the interstate activities of the corporation. Thus it was permissible for the state of Missouri to prohibit the International Harvester Company from doing business within the state until it complied with certain state regulations.[2] But a license tax levied upon a telegraph company affects both its interstate and state business and hence it is unconstitutional,[3] while in 1909 it was held that a charter fee of a certain per cent might not be exacted from a foreign telegraph company as a condition of doing intrastate business.[4] In like manner, in 1827, it was upheld that a license tax on an importer or upon the business of importing foods was invalid.[5] As a consequence it is forbidden to tax "drummers," whether agents of corporations or not, who are merely soliciting business.[6] But when the goods imported into a state are commingled with the general articles of commerce, in other words, when the original packages in which they are imported are broken, they cease to enjoy the protection of the commerce clause. A state, therefore, may regulate their sale and the agents accomplishing this sale. Hence "drummers," persons who solicit orders for the importation of goods, are distinguished

A state may not tax a corporation so as to affect interstate commerce

Distinction between "drummers" and "peddlers"

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[1] *Paul* v. *Virginia*, 8 Wall 168, 181.

[2] American Year Book (1914), p. 259; *International Harvester Co* v. *Missouri*, 234 U.S. 199.

[3] *Leloup* v. *Port of Mobile*, 127 U.S. 640.

[4] *Western Union Tel Co.* v. *Kansas*, 216 U S. 1; see also W. W. Willoughby, The Constitutional Law of the United States, Vol. II, pp 698–699, for criticism of this decision.

[5] *Brown* v *Maryland*, 12 Wheat. 419, 437, 447.

[6] *Robbins* v *Shelby County Taxing District*, 120 U S. 489.

from peddlers, persons who sell goods already within the state. Drummers may not be taxed or subjected to license fees as agents from another state, while peddlers may be licensed, providing such licenses do not discriminate against goods brought from another state.[1]

STATE REGULATION OF TRANSPORTATION

State regulation of the operation of railroads

In the exercise of the police powers of the states commerce is affected in other ways. Not only may a state guard the morals, health, and safety of its inhabitants, but it may provide for their convenience. By a series of decisions the court has upheld state laws, forbidding the running of freight trains on Sunday, requiring trains to stop at county seats, requiring locomotive engineers to be examined by state authorities, regulating the heating of passenger cars, and many other such regulations.[2] The general principles on which these cases were decided were that the court would consider whether the law in question was one which was necessary for the convenience or safety of the people. If these facts were established, the law was upheld. On the contrary, if it were shown that the community in question was adequately served, its size and importance being considered, the law was held to be an arbitrary and unnecessary burden upon interstate commerce and was disallowed. Thus the court disallowed a regulation of the South Carolina Railroad Commission, requiring the Atlantic Coast Line to stop its fastest expresses at Latta, a hamlet of four hundred and fifty-three persons, on the ground that as there were numerous local trains stopping there, and as the fast train stopped at a station within twenty miles, such a regulation was unnecessarily burdensome to the railroad.[3]

State regulation of rates

The states, furthermore, have power to regulate the rates which public service corporations may charge. The restrictions upon the power are two: (1) the rates must not be confiscatory,

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[1] *Emert* v *Missouri*, 156 U. S. 296.

[2] For a list of such cases with references, see W. W. Willoughby, The Constitutional Law of the United States, Vol. II, pp. 665–670.

[3] J. T. Young, The New American Government and its Work, p. 210; *Atlantic Coast Line* v. *The Railroad Commissioners of South Carolina*, 207 U S. 328 (1907).

Minnesota Rate Case

which would be to deprive the corporation of its property without due process of law; and (2) the rates prescribed for domestic commerce must not affect interstate commerce unduly. By a series of decisions beginning in 1877 [1] it was held that states might fix rates not merely for purely domestic commerce but for the portions of interstate business performed within their boundaries. But in 1886 the court altered its point of view. It then held that although the state had the power to prescribe rates for transportation beginning and ending within the state, it had no power to fix rates or fares for transportation which originated or terminated outside of the state. Such transportation was interstate in character and under the exclusive control of Congress.[2] But the recent opinion of the court states the more modern doctrine. In the *Minnesota Rate Case* (1912)[3] it was held that states might prescribe reasonable rates for exclusive internal traffic on interstate carriers, although it may be "by reason of the interblending of the interstate and intrastate operations of intrastate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former. . . ." While in the *Shreveport Case* (1913) [4] the court upheld the Interstate Commerce Commission in declaring that the rates fixed by the Texas Railroad Commission were discriminatory against commerce destined for Shreveport, Louisiana, and hence illegal. In giving the opinion of the court Justice Hughes said:

Shreveport Case

> Whenever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule.[5]

This decision, while lessening the power of the state to prescribe rates, will tend to bring uniformity and justice in both interstate and intrastate commerce.

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[1] *Munn* v. *Illinois*, 94 U S. 113.

[2] *Wabash, St Louis & Pacific R. R. Co* v. *Illinois*, 118 U S. 557.

[3] *Simpson* v. *Shepard*, 230 U.S. 352, see also *Political Science Quarterly*, Vol XXIX, pp. 57 et seq

[4] 234 U.S. 342, 432, 433.

[5] 234 U. S. 351.

Limitations on state taxation of interstate commerce

Although a state may not tax interstate commerce either directly or indirectly in such a way as to burden or restrict it, a state may tax all the property within its boundaries. But in accordance with the doctrine of *Brown* v. *Maryland*,[1] this property must be actually mingled with the general mass of property within the jurisdiction of the state. Real estate, vessels registered within the ports of the state, the average number of cars continuously used in the state, may be taxed. But may a state use other units based upon the amount of freight or passengers carried or the amount of business done within the state? There has seemingly been a change of opinion on the part of the court on this question. Thus, in 1873 it was held that a tax upon freight transported from state to state was an interference with interstate commerce and hence invalid.[2] But in the same year it was held that a tax upon the gross receipts of a railroad company doing business within a state was constitutional. Thus the court said: "The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest."[3] The reasoning of *Brown* v. *Maryland* was followed and it was held that the tax rested not upon interstate commerce but upon the receipts derived not merely from interstate commerce but from all sources, and that these were mingled together with the other resources of the company. In 1887 the court reexamined its reasoning and held that a tax upon the gross receipts of a steamship company was a tax upon interstate commerce and hence unconstitutional. It was held that such a tax was not like a tax upon imported goods which had been commingled with the other property of a state, for these goods were singled out for taxation by reason of their being imported; whereas the receipts of a transportation company "are taxed not only because they are money, or its value, but because they were received for transportation."[4] This reasoning holds to this day.[5]

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[1] 12 Wheat. 419, 437, 447.

[2] *State Freight Tax*, 15 Wall 232.

[3] *State Tax on R. R Gross Receipts*, 15 Wall. 284, 294.

[4] *Philadelphia Steamship Co.* v *Pennsylvania*, 122 U S 326, 342

[5] For the power of a state to tax the property of interstate carriers see Willoughby, The Constitutional Law of the United States, Vol II, pp 711-726.

FEDERAL LEGISLATION CONCERNING COMMERCE

Thus far the powers of the states to legislate concerning commerce have been discussed. It has been shown that to the states is left a wide field of action, but that in this field state action must always be subordinate to the federal power of legislation. The next topic is naturally a discussion of the federal legislation concerning commerce. This will be considered under three heads: legislation concerning trade with the Indians, legislation concerning foreign commerce, legislation concerning interstate commerce.

Regulation of commerce with the Indians

The regulation of commerce with the Indians began in 1790 by the passage of an act requiring traders to obtain licenses.[1] This was followed by a long series of acts designed to protect the Indians against unscrupulous traders and to prevent the sale of intoxicating liquors. In 1866 the court, in upholding one of these laws, summarized the previous decisions and held that if commerce was to be carried on with an Indian tribe or a member of a tribe, "it is subject to be regulated by Congress, although within the limits of a state." Furthermore, "neither the constitution of the state nor an act of its legislature . . . can withdraw them [Indians] from the influence of an act of Congress which that body has a constitutional right to pass concerning them."[2] Since then the power of Congress to regulate or prohibit the trade with Indians has been unquestioned.

Regulation of foreign commerce

Regulation of foreign commerce also began in the first Congress. On July 4, 1789, an act laying duties on goods imported into the United States was passed. In 1790 Washington recommended the promotion of such industries as would make the United States independent of other nations particularly in military supplies. In 1791 Hamilton's famous report recommended a protective tariff; and from that time duties have been collected not merely for revenue but also for the protection of American industries. The constitutionality of these measures has been upheld upon two grounds: (1) that they were revenue measures, and (2) that they were acts regulating trade which Congress had undoubted power to regulate.

The protective tariff

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[1] 1 Stat. at Large, chap. xxxiii.

[2] *United States* v. *Holiday*, 3 Wall. 407, 419.

Attitude of the political parties

The attitude of the two great parties upon the question of protection is quite antagonistic. The Federalists and their successors, the Whigs and Republicans, have stood quite consistently for a tariff giving high protection. The Democrats, on the other hand, have insisted that the tariff should be levied chiefly for revenue, and that the protective features should be reduced to a minimum. This difference in policy has been discussed in other chapters.[1]

Embargoes

Federal legislation concerning foreign commerce has not been confined to tariff regulations. Regulation of foreign commerce includes the power to prohibit; and Congress has frequently empowered the president, under certain circumstances, to lay an embargo upon commerce or to prohibit commerce from certain nations.[2] A recent example of this power is when Congress in 1912 authorized President Taft to lay an embargo upon the exportation of arms to Mexico. Still more drastic were the embargoes which President Wilson laid upon commerce destined for neutral countries whose neutrality was suspected, the licenses that were issued for trade in certain commodities, and the prohibitions which were laid upon the importation of certain articles.[3]

Tonnage dues and increased duties

In addition to the prohibition of commerce, Congress has very frequently passed laws levying tonnage dues or increased duties upon the commerce of nations discriminating against the United States. In these acts the president is usually given the power to put such legislation in force upon satisfactory evidence of discrimination against the United States; and to suspend the operation of the laws when he is satisfied that the discrimination has been removed.[4]

The act of 1890 was questioned as involving an unlawful delegation of legislative power. In 1891, however, the court answered this objection in these words:

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[1] Chapters V and XVIII.

[2] 1 Stat. at Large (1794), chap. xli, p. 372; ibid. (1798), chap. liii, p. 565; ibid. (1799), chap. ii, p 613; 2 Stat. at Large (1806), chap xxix, p. 379; ibid. (1809), chap. xxiv, p. 528. See also *Field* v. *Clark*, 143 U.S. 649.

[3] See Trading with the Enemy Act, 65th Cong., Public Act 91.

[4] 3 Stat. at Large (1815), chap. xxxvii, p. 224; ibid. (1817), chap. xxxix, p. 361; 4 Stat. at Large (1824), chap. iv, p. 2; ibid. (1828), chap. cxi, p. 308; ibid. (1830), chap. ccxix, p. 425; 14 Stat at Large (1866), chap. xii, p. 3; 26 Stat. at Large (1890), chap. mccxliv, p. 616.

The court holds that Congress may empower the president to put into effect increased duties in certain contingencies

That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is inconsistent with that principle. It does not, in any real sense, invest the president with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the president . . . Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in the execution of the act of Congress. It was not the making of the law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect [1]

Reciprocity

In the tariff act of 1897 the principle of reciprocity was reintroduced but made to depend upon a treaty requiring the consent of two thirds of the Senate instead of upon executive proclamation. In a few cases reciprocity treaties have been negotiated, as for example with Canada (1854–1866) and Hawaii (1876–1900), but many others have failed because of the opposition of the Senate. In 1911 a reciprocity treaty with Canada although ratified by Congress was rejected by Canada.

Prohibition of trade in certain articles

In the regulation of commerce Congress has the power to prohibit trade in certain articles. A constitutional restriction is found in Article I, Sect. ix, clause 1, of the Constitution, which prevented Congress from putting an end to the slave trade until 1808. By the act of 1807, however, this trade, already illegal in all the states except Georgia and South Carolina, was prohibited at the earliest possible date.

Immigration

Commerce includes transportation of persons as well as of things. Consequently Congress has the power to regulate immigration to the United States. In 1848 it was decided by the court that the federal government had exclusive jurisdiction over all matters relating to immigration, and consequently taxes imposed by the states were illegal.[1] In 1899, in the *Chinese Exclusion Case*,[2] it was said:

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[1] *Field* v. *Clark*, 143 U. S. 649, 692, 693.

Chinese Exclusion Law upheld

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

Consequently the government possesses the power to supersede a treaty allowing immigration and to regulate even to the extent of forbidding immigration.

Classes excluded by immigration laws

The first federal act concerning immigration was passed in 1864, providing for an Immigration Commission which should cooperate with the states in inducing immigrants to come and in protecting them against fraud. In 1882 began the policy of restricting immigration. The excluded classes by this act were idiots, escaped convicts, and persons likely to become public charges. Since that date additional restrictions have been added frequently until in 1917 the excluded classes included not merely the above but persons afflicted with a dangerous or contagious or loathsome disease, those who confess to or have been convicted of a crime involving moral turpitude, anarchists, those morally unsound, prostitutes and purveyors of prostitutes, paupers and professional beggars, orientals and those who cannot read some language or dialect. This last clause has been a bone of contention since the administration of President Cleveland, who vetoed a bill containing a similar clause; President Taft did likewise; and President Wilson vetoed a similar bill in 1915, and also the present one, which was passed over his veto by a nonpartisan vote.

Literacy test in law of 1917

Contract labor

One other class has been excluded at the demand of organized labor. This includes laborers who come to this country under contract, except teachers, actors, musicians, ministers, and domestic servants. This act, originally passed in 1895, was extended in 1903 so as to cover every kind of implied contract.

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[1] *Passenger Cases*, 7 How. 283.

[2] 130 U. S. 581, 609.

Enforcement of immigration laws

The enforcement of the immigration laws is in the hands of the Department of Labor, particularly in the Commissioner-General of Immigration. Local commissioners are appointed at various ports under whom inspectors apply the law. Appeals lie from the inspectors to the commissioners, from them to the Commissioner-General, thence to the Secretary of Labor, whose decision is final.

Navigation and inspection law

Congress has furthermore regulated foreign and domestic commerce by the passage of navigation and inspection laws. These laws require all vessels to conform to certain regulations of safety and health, and are enforced by inspectors acting under the Department of Commerce. The last of these laws, the La Follette Seaman's Act, passed in 1915, makes radical changes in the customs of employment at sea. Not only are there burdensome requirements in the interest of extreme safety, increased allowances for food of the seamen, and the abolishment of corporal punishment, but the whole system of payment of wages is altered. All treaties to which the United States is a party which conflicted with the provisions of the act were to be abrogated within ninety days of the passage of the act. Certain interesting rulings have been made by the officials in charge of the administration of the law. The Attorney-General has ruled that the safety appliances section did not apply to vessels of nations which had "approximately" equal laws; while the Secretary of Commerce ruled that the section which required that 75 per cent of the crew in each department should be able to understand the language of the officers meant the language used, not necessarily English.[1] Nevertheless, the restrictions of the act are so severe that it is asserted that vessels under American register have practically ceased to be operated in the Pacific.

The La Follette Seaman's Act, 1915

LEGISLATION CONCERNING INTERSTATE COMMERCE

As has been shown, the earliest legislation dealt with foreign commerce, yet as early as 1824 the court thus clearly indicated that interstate as well as foreign commerce were both subject to federal legislation:

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[1] American Year Book (1915), p 433.

> The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.[1]

Power of Congress to regulate interstate commerce may be exercised within the states

Until 1887, however, the power of the government was more frequently invoked to prevent state interference than to establish federal regulation of interstate commerce.

Internal improvements

In one respect, however, the government aided interstate commerce. This was in the field of internal improvements. Internal improvements have been made in two ways. At the adoption of the Constitution it was customary for the different states to improve their harbors, and with the assent of Congress to levy port duties to cover the expense. For example, one act passed by Maryland in 1780 was continued by successive consents of Congress until 1850. A second method, beginning with the first Congress, was to appropriate money for lighthouses. In every instance Congress required that the state on whose shores the improvements were made should cede the site to the United States. With the rapid growth of the West two ideas arose: (1) that it was unfair to charge commerce with taxes levied by the states for their own improvement, and (2) that the inland territories should share in improvements made by the federal government. In 1806 this idea found expression in an appropriation for the Cumberland Road. From that time steady pressure was brought to bear upon Congress for similar appropriations. Jefferson, Madison, and Monroe, while doubting the constitutionality of these measures, admitted their necessity. In consequence roads were constructed through the territories, and when such highways crossed the states, special compacts were made. In 1823 the first act for the improvement of harbors at the expense of the government was passed. In 1824 Congress appropriated thirty thousand dollars for the survey of such roads as the president should direct, and in 1825 the

Development of congressional policy in aiding internal improvements

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[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 195.

government subscribed to the Delaware and Chesapeake Canal. Adams favored this policy and over two million dollars were appropriated during his administration. Jackson had constitutional objections and vetoed all special appropriations for internal improvements. Nevertheless, through riders attached to general appropriation bills, over ten million dollars were appropriated during his administration. Thus, in spite of constitutional objections and vetoes from presidents the policy of making internal improvements at the expense of the federal government has continued and grown to enormous proportions. Since the Civil War the construction of the Pacific Railroad and the improvement of the Mississippi and Ohio Rivers have been the greatest single projects. In addition, vast sums have been appropriated for the improvement of rivers and harbors, while the building of irrigation works and the establishment of national forests have opened up new fields of national activity. Since 1908 over two hundred and fifty million dollars have been appropriated for rivers and harbors alone.

Criticism of congressional method of appropriation

The method of appropriation of this vast sum is open to criticism. Attempts have been made to adopt some comprehensive scheme by which different projects may be begun and carried to completion. But with the exception of the improvements along the Ohio and the Mississippi this method has not been followed. On the contrary, not only does each senator attempt to get a large share for his state, but each representative tries to secure the construction of some improvement in his district. The committee in charge of the bill is subject to the severest pressure, and opportunities for "log-rolling" and bargains are numerous. The bill itself, popularly known as the "pork barrel," thus contains not merely appropriations for meritorious schemes but also grants inserted by persons of political influence. So flagrant have these been at times that the entire bill has been defeated by a presidential veto.

The constitutionality of these appropriations can be defended upon several grounds: the regulation of commerce, provision for post roads, military necessity. In 1887 the court said, concerning the laws authorizing the construction of the Central Pacific Railroad;

Constitutionality of appropriations for internal improvements upheld

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state is essential to the complete control and regulation of interstate commerce.[1]

While in 1894 the court upheld the power of Congress not only to authorize the construction of these roads but also to exercise the right of eminent domain in taking the necessary land with or without the consent of the state within which the land might be situated.[2] Thus, if Congress can acquire land with or without the consent of the state, it must of necessity follow that Congress can exercise jurisdiction over the improvements constructed upon such land as long as the purpose of such improvement be a national one.

Regulation of interstate railroad rates

The states were at first allowed to prescribe the rates charged by common carriers. In 1886, however, the Wabash decision checked such a policy.[3] It will be remembered that the court held that the state had no power to prescribe rates for commerce originating or terminating outside of its territory, since that was interstate commerce and under the protection of the federal government. Complaints against unjust discrimination, rebates, and excessive rates were not new; but hitherto it seemed that the states might at least attempt to cope with the evil. The Wabash decision transferred the agitation from the state legislatures to Congress. As a result, in 1887 the first Interstate Commerce Law was passed. By this law a commission of five was appointed to investigate, and in case of illegal practices to order such to cease. The order of the Commission, however, could only be enforced by equity proceedings in the federal courts. Discrimination, poolings, and rebates were prohibited, while the roads were directed to file tariffs which should be open to the public. It was also made illegal to charge a higher rate for a short haul than for a long haul over the same line and in the same direction.

The Interstate Commerce Commission

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[1] *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, 39.

[2] *Luxton* v. *North Bridge Co.*, 153 U. S. 525.

[3] See p 492

Court in 1897 denied that the Commission could prescribe rates

The work of the Commission was hampered in many ways. Although the act required the carriers to charge reasonable rates, it did not specifically empower the Commission to determine what these rates should be. Yet this is what the Commission attempted to do until checked by the court in 1897. In denying this to the Commission the court said: "The grant of such a power is never to be implied. . . ." After examining the law of 1887 and the similar legislation of many states the court concludes: "Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum, or minimum or absolute."[1]

Commission given power to prescribe rates by act of 1906

This was remedied by the law of 1906 which authorized the Commission to prescribe, after a full hearing, just and reasonable rates. This act, however, raised certain constitutional questions. Has not Congress delegated to the Commission legislative power? In other words, is the direction that the rates shall be "just and reasonable" a sufficient legislative principle on which an administrative body may proceed, without itself assuming to legislate? In 1914 the court in sustaining an order of the Commission concerning the "long and short haul" passed upon this question. The railroads claimed that such legislation was an unconstitutional delegation of legislative power. To this the court replied: "The argument is that the statute, as correctly construed, is but a delegation to the Commission of legislative power which Congress was incompetent to make. But the contention is without merit."[2]

Law upheld by the court

The Commission in prescribing rates for interstate commerce may also regulate the rates on intrastate commerce

In the same year, in the *Shreveport Case*, the court, in upholding an order of the Commission, took the final step toward bringing all rates, both state and interstate, under the regulation of the Commission. Shreveport, Louisiana, only forty miles from the boundary, competed with Dallas and Houston, Texas, for the trade of that portion of Texas. The rates from points within Texas to Dallas and Houston, as fixed by the state railroad commission, were decidedly less than the rates from Shreveport. Thus Shreveport was put at a disadvantage. The Interstate Commerce Commission after hearing evidence fixed the rates for interstate commerce from Shreveport to points within Texas, and ordered the roads in Texas to abstain from exacting any higher rates for the transportation from Shreveport to Dallas and Houston than are contemporaneously exacted for the transportation of such articles from Dallas or Houston toward said Shreveport for an equal distance.[1] The effect of this order was to force the roads to alter rates for intrastate commerce which had already been fixed by the state commission. The order was attacked upon many grounds, but chiefly upon the ground that the Commission had no power to regulate rates on purely intrastate commerce. In disposing of this objection Justice Hughes said:

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[1] *Interstate Commerce Commission* v. *Cincinnati, N. O. & Texas Pacific R. R. Co.*, 167 U. S. 479, 494, 511.

[2] *Intermountain Rate Cases*, 234 U. S. 476, 486.

The *Shreveport Case*

Through the paramount power of Congress to protect interstate commerce intrastate commerce may be controlled

> While these decisions sustaining the federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

A state may not authorize an interstate carrier to do what Congress has lawfully forbidden

> The principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. . . .

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[1] 234 U. S. 347–349.

Congress may supply the needed correction when the relation between interstate and intrastate rates needs correction

It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce. . . . Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines, in accordance with the terms it establishes.

Congress may act through the Interstate Commerce Commission

Having this power, Congress could provide for its execution through the aid of a subordinate body, and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.[1]

Work of the Interstate Commerce Commission

On the whole the work of the Interstate Commerce Commission has been beneficial. Rebates and secret agreements have not altogether ceased, but the practice is rapidly being suppressed, and the punishments are severe. Other forms of discrimination have been investigated by the Commission on the complaints of the injured party, and the federal courts have awarded large damages against the offenders. In the making of rates the Commission has been criticized most severely. The roads complain that they are unable to meet the increased cost of operation, that the Commission is too theoretical and arbitrary in its classification of rates, and that it proceeds upon too little knowledge of facts. On the other hand, certain shippers have felt aggrieved that the Commission has allowed an increase of rates, and complain that the railroads have too much influence with the Commission. Nevertheless, it is generally admitted that the federal regulation of the rates on the great interstate carriers has produced salutary results, and in its work the Commission has justified itself. Had the ill-fated Commerce Court been more efficient and been allowed to develop special knowledge of railroad law, more speed and uniform procedure might have resulted, which would have been a great advantage to the Commission.

With the outbreak of the World War in 1914 and the consequent vast increase in cost of all railroad material and the

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[1] *Houston, East and West Texas R. Co.* v. *United States*, 234 U. S. 342, 353–355.

Government operation of railroads during the World War

unprecedented increase in amount of traffic the roads were put in a difficult condition. This condition was aggravated many times by the entrance of the United States into the war until conditions became intolerable. Congestion was so great that even the necessities of life could not be delivered, and the roads found that the demands made upon them for new equipment and by labor could not be met from the rates fixed by the Commission. The huge loans which the government was issuing proved a more attractive investment than railroad securities, and the roads had difficulty in obtaining the necessary funds with which to renew their securities which came due. Consequently the president recommended that the operation of the roads be taken over by the government. This was done by executive proclamation in December, 1917, and the Secretary of the Treasury was appointed Director of the Railroads. In March Congress finally passed an act providing for the compensation of the roads, and fixing the time of government operation at not more than one year and nine months after the close of the war.[1] Under government control certain interesting things have happened. Financial aid has been given to the roads as needed, and their financial obligations have been taken care of, the service has been greatly curtailed, and the rates raised to an unprecedented degree. Wages also have been increased to what is considered by some an extravagant amount. But most interesting has been the ignoring of the principles upon which the Sherman Law was founded. Competition instead of being insisted upon has been abolished in many cases. The resources and even the physical connections of competing roads have been used in common. In a word, cooperation rather than competition has been sought. It cannot be said that the service has improved; but in answer to the complaints it should be remembered that the demand of the war was unprecedented.

FEDERAL REGULATION OF TRUSTS

Growth of trusts and large corporations

After the depression of 1873 industry was carried on upon a larger and more concentrated scale than ever before. Corporate organization took the place of individual enterprise. Goods were manufactured in larger quantities, while competition for business produced ruinous price cutting. Corporate management had produced many economies in manufacture, and these advantages were now desired in the disposition and sale of the goods. This was sometimes secured by price agreements, and sometimes by outright purchase and consolidation of competing plants. In 1882, however, the Standard Oil Trust showed a more advantageous way. By the trust method the stock certificates of the various competing companies were deposited with trustees who conducted the entire business of all the concerns included and divided the profits pro rata. The advantages were obvious. Centralized control of purchase, manufacture, and sale were secured; competition among the industries within the trust was ended. But other advantages less obvious and more insidious were achieved. The trust avoided the expense of purchase and consolidation while reaping the benefits of such procedure; no new corporation requiring a new charter prescribing its privileges and responsibilities was required and all publicity was avoided. Other industries were quick to catch the idea. Although the trust method of reorganization was not followed in all consolidations, the name "Trust" came to be popularly applied to all large corporations.

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[1] 65 Cong., Public Act 107.

Reasons for popular suspicion of trusts

These huge organizations were bitterly attacked. By checking competition it seemed as if monopolies were created, and it was felt that prices would be increased. In their efforts to drive competitors out of the field trusts too often indulged in indefensible practices; and from the mere size of their shipments forced the railroads to give rebates and to discriminate against their competitors. Their mischievous activities were not confined to industry alone. In some states it was felt that the corporations or the trusts with their immense resources were controlling the legislature and threatening the political life of the state. During the eighties the trusts were feared, hated, and attacked.

The Sherman Anti-Trust Act, 1890

As a result of this agitation, Congress, in 1890, passed the so-called Sherman Anti-Trust Act, entitled "An Act to protect Commerce against Unlawful Restraints and Monopolies." In this law a prohibition is laid upon "every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." The application of this act has brought up many interesting problems.

Manufacture is not commerce, but manufacturers may combine so as to effect a restraint of commerce

Did the act apply to manufacturers? In the first place, what is commerce? As has been shown in the Knight case,[1] commerce does not include manufacture. "Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked." But in the Addyston Pipe case[2] it was held that where the immediate result of a combination of manufacturers was necessarily a restraint upon trade, such a combination would fall within the prohibitions of the statute. "The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. . . ." In deciding the Addyston case the court held that "The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made."

The Anti-Trust Law applied to railroads

Did the Sherman Law apply to railroads? In 1897 it was held that the law applied to railroads engaged in interstate commerce, and that those contracts between competing roads relating to traffic rates which would produce a restraint of trade were illegal.[3] In 1904, in the *Northern Securities Case*, the court prohibited an investment or holding company from voting the shares it held of competing roads or interfering in their management. This was a decided extension of federal supervision. The investment company was chartered in New York and authorized to purchase, hold, and sell securities, and perform other acts designed to protect, preserve, and improve such securities. To this corporation was turned over a controlling amount of stock in the two great transcontinental railroads, the Great Northern and the Northern Pacific. The government proceeded against the company upon the ground that, although not itself a corporation engaged in interstate commerce, it might operate to check competition and thus exert a restraint upon trade. In the course of the majority opinion, Justice Harlan said:

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[1] *United States* v. *Knight*, 156 U.S. 1, 17.

[2] *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 240, 241.

[3] *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290.

The *Northern Securities Case*

> . . . It [the government] does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and that are not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will legally expressed. [And thus although the Court may not dissolve the corporation, it can,] by appropriate orders, prevent the two competing railroad companies here involved from cooperating with the Securities Company in restraining commerce among the States. In short, the Court may make an order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce.[1]

Thus it was made evident that the majority of the court intended to construe the power of Congress very broadly and also to give the terms of the Anti-Trust Act a most extensive interpretation. By this decision organizations and acts which in their formal character have nothing to do with interstate commerce are brought under the provisions of the Anti-Trust Act if they show a plan or a capability of restraining interstate trade.[2]

The Anti-Trust Act applied to labor unions

In 1908 the principles of the act were extended to a boycott ordered by a labor union. In holding that the boycott was illegal the court had again to point to the general purpose of the law forbidding restraint of trade. The act complained of, that is, the boycott itself, was of course operative within the states, but the effect of the boycott was to restrain the trade in hats between the states, and as such was an act contrary to the terms of the Anti-Trust Law, and thus illegal.[3]

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[1] 193 U S 197, 334, 335, 346.

[2] W W. Willoughby, The Constitutional Law of the United States, Vol. II, pp. 757–758.

[3] *Loewe* v. *Lawler*, 208 U.S. 274.

Another interesting line of reasoning has been followed by the court in interpreting this act. It will be remembered that the title of the act was "An Act to protect Commerce against Unlawful Restraints," while the body of the act reads: "Every contract . . . in restraint of trade or commerce . . . is unlawful." In 1896 the court had said:

In early interpretation the court held every contract in restraint of trade illegal

> Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade. . . . In other words, we are asked to read into the act by way of judicial legislation an exception which is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do.[1]

This was opposed in an able minority opinion by Justice White with whom Justices Field, Gray, and Shiras concurred. In the course of it he said:

Dissenting opinion

> . . . To define, then, the words, "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade and therefore nothing to restrain.

The "Rule of Reason," 1911

Nevertheless, the opinion of the majority continued to be the reasoning applied by the court until 1911. In the Standard Oil case and the American Tobacco Company case decided in that year Justice White, now Chief Justice, succeeded in bringing seven of the justices to the point of view he had maintained since 1897. From an exhaustive examination of the common-law definition of monopolies and contracts in restraint of trade he came to the conclusion that only contracts in unreasonable restraint of trade were held illegal by common law. He then held that the Anti-Trust Law of 1890 was drawn with this distinction and meaning in mind. Finally, he examined the previous decisions of the court, and asserted that although the majority of the court had at times interpreted the act to forbid all contracts in restraint of trade, "every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute."[1]

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[1] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340, 351.

This almost unanimous opinion brought a violent and elaborate dissenting opinion from Justice Harlan. He had consistently upheld the view that Congress had in the act forbidden every contract in restraint of trade, that the court has no power to apply the rule of reason and determine whether the contracts constituted undue restraints. After reviewing the position of the court in the previous cases and noting its oft-repeated assertion that the courts could not amend an act of Congress, he said:

Dissenting opinion of Justice Harlan

> Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.[2]

Effect of the "Rule of Reason"

Before the court enunciated the "Rule of Reason," the government was successful in proceeding against many large combinations. In most cases it could be shown that there was a contract which might be interpreted as a possible restraint of trade, and the corporation was dissolved. In some cases the consolidations themselves dissolved with the consent of the government in order to escape prosecution.[3] In other cases which have been carried to the courts the rule of reason has been very justly applied. For example, in the case of the St. Louis Terminal Association in 1912 the court held that although there were certain oppressive features which must be eliminated, the combination was on the whole beneficial and reasonable and was allowed to stand.[4]

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[1] 221 U.S. 1, 68.

[2] 221 U.S. 1, 104, 105.

[3] For example, the Western Union Telegraph and the American Telephone companies, and the New York, New Haven & Hartford and the Boston & Maine Railroad companies.

[4] *United States* v. *Terminal R.R. Association of St. Louis*, 224 U.S. 383.

PATENTS AND COPYRIGHTS

Monopolies established by patent laws

But other problems arose in the enforcement of the Anti-Trust Law. The Constitution gives to Congress power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[1] Under this clause Congress has enacted the patent and copyright laws which establish temporary monopolies. Acting under their assumed rights the holders of patents and copyrights attempted to do various things which seemed to be in restraint of trade, for example: (1) to force the purchaser of a patented article to use other articles unpatented, manufactured by the holder of the patent; (2) to compel a retailer to buy everything or nothing in certain lines from the holder of the patent in order to obtain the patented article; (3) to fix the price upon a patented article and attempt to compel all retailers to become mere agents of the patentee in order that the price might be maintained; (4) to refuse to sell to any retailer who cut the fixed price of copyrighted books or patented articles. These practices were obviously in restraint of trade and hence forbidden by the Sherman Law. But what right did the holders of the patent or copyright have? The decisions of the court have not been consistent upon all these points.

In 1912 in the Dick Co. case the court held that a patentee might regulate use of patented article after sale

In 1912 the court held that a license restriction may lawfully be imposed on the purchaser of a mimeograph, that the machine sold may be used only with the stencil paper, ink, and other supplies made by the patentees, although they are not patented. In coming to this conclusion the court reasoned as follows:

> The property right of a patented machine may pass to a purchaser with no right of use, or with only the right of use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional. But if the right of use be confided by specific restriction, the use not permitted is necessarily reserved to the patentee.[2]

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[1] Article I, Sect. viii, clause 8

[2] *Henry* v. *Dick Co.*, 224 U. S. 1, 24.

Chief Justice White, with whom two other justices concurred, clearly brought out in his dissenting opinion the consequences of such a decision:

Dissenting opinion of Chief Justice White

> Take a patentee selling a patented engine. He will now have the right by contract to bring under the patent laws all contracts for coal or electrical energy used to afford power to work the machine, or even the lubricants employed in its operation. Take a carpenter's plane. The power now exists in the patentee by contract to validly confine a carpenter purchasing one of the planes to the use of lumber sawed from trees grown on the land of a particular person, or sawed at a particular mill . . . Take an illustration which goes home to everyone, — a patented sewing machine. It is now established that, by putting on the machine, in addition to the notice of patent required by law, a notice called a license restriction, the right is acquired as against the whole world, to control the purchase by users of the machine of thread, needles, and oil lubricants or other materials convenient or necessary for operation of the machine.[1]

In 1913 when the composition of the court had been altered by new appointments the court held a different point of view. This was seen in the Sanatogen case.[2] Bauer and Company made and shipped Sanatogen in packages licensed for sale at one dollar. Any sale in violation of this condition was claimed to be in violation of their patent. O'Donnell sold packages at less than a dollar, whereupon he was sued for infringement of patent rights. In deciding against Bauer and Company the court said:

In 1913 the court held patentee had no right to control price of patented articles after sale

> . . . It was the intention of Congress to secure an exclusive right to sell, and there is no grant of privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within the line of cases in which this court has from the beginning held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act."[3]

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[1] *Henry* v *Dick Co*, 224 U.S. 1, 55.
[2] *Bauer* v *O'Donnell*, 229 U.S. 1.
[3] Ibid. 1, 17.

The same line of reasoning was followed by the court in the case of R. H. Macy and Company against the publishers.[1] The court held that after the book was once sold to the retailer the publisher had no control over the price, and that the action of the publishers in attempting to check the supply of books to a retailer who cut prices was unjustifiable and a restraint of trade forbidden by the Sherman Law.

So also in 1917 the Dick case was directly overruled by name.[2] The case was similar in many respects to the Dick case in that it showed an attempt on the part of a patentee to prescribe the use of certain attachments upon which the patent had expired. In deciding against the patentee the court said:

The Dick case overruled

> Plainly, the language of the statute [the patent act] and the established rules to which we have referred restrict the patent granted on a machine, such as we have in this case, to the mechanism described in the patent as necessary to produce the described results. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. . . .
>
> It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry* v. *Dick Co.* [supra] must be regarded as overruled.[3]

Contracts to make dealers in unpatented articles agents, in order to fix the price, held illegal

In the case of unpatented articles the Miles Company had attempted by means of contracts with the wholesalers and retailers to maintain the price upon certain unpatented secret remedies. These contracts, the company claimed, made the dealers the agents of the Miles Company. But the court held that the contracts operated as a restraint of trade and were unlawful both at common law and as to interstate commerce under the Anti-Trust Act.[4]

Licenses to dealers which fix the price illegal

In like manner, in 1917, the court held that a patentee could not through the means of a license notice, purporting to constitute dealers agents, fix the price at which the retailers should be obliged to sell the product. Thus Justice Clark in giving the opinion of the court said:

> Courts would be perversely blind if they failed to look through such an attempt as this license notice thus plainly is to sell property

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[1] *Strauss and Strauss* v. *American Publishers Association*, 231 U. S. 222.

[2] *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502.

[3] Ibid. 512, 518.

[4] *Dr. Miles Medical Co.* v. *Park*, 220 U. S. 373.

for a full price, and yet to place restraints upon its further alienation, such as have been hateful to law from Lord Coke's day to ours, because obnoxious to public interest.[1]

Effect of Sherman Anti-Trust Act

The Sherman Anti-Trust Act has thus been a very effective weapon in breaking up combinations and opening free competition. As interpreted by the court it forbade any attempt at price fixing and demanded the possibility of absolutely free competition. If this was the end desired, then the law had accomplished its purpose. But experience showed that price-cutting is very often practiced by a certain class of dealers merely to serve as an advertisement. The public is at best but temporarily benefited and that to a very limited extent, while the entire trade in the articles is grievously dislocated. The manufacturers, moreover, are seriously disturbed. They have built up their business processes for the production of an article at a certain price. They no longer take advantage of price fluctuations, but aim to supply the market at a constant price. In addition vast sums of money are spent in familiarizing the public not merely with the article but its quality, quantity, and its price. Much of this advertisement is rendered worthless if the dealer can arbitrarily alter the prices.

The Bureau of Corporations

Besides the drastic method of regulation of corporations by dissolution applied by the Sherman Act, two other methods of regulation have been attempted. In 1903 the Department of Commerce and Labor was created with a Bureau of Corporations. The act required the Commissioner of Corporations to make investigations concerning the organization and the conduct and management of corporations engaged in interstate or foreign commerce, excepting "common carriers." The results of his investigations were to be transmitted to Congress with recommendations for legislation. This act foreshadowed two new methods of regulation. First, the separation of carriers from other corporations, vesting in the Interstate Commerce Commission the control of carriers, and second, the use of investigation and information with its consequent publicity as a means for forcing the abandonment of illegal or unjust practices and the

Regulation by publicity

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[1] *Strauss* v. *Victor Talking Machine Co.*, 243 U S. 490, 500–501.

resulting reformation. The Bureau published detailed investigations of some of the largest industries of the country, — steel, tobacco, sugar refining, transportation of petroleum, and so forth. The effects of this work were gratifying. In some cases the fact that agents of the Bureau were engaged in investigation led to a change in policy; while the publication of the findings of the Bureau hastened the movement for the publication of frequent reports by the largest industrial corporations.

In 1909 a corporation tax was included in the Tariff Act of that year.[1] This required all corporations, whether engaged in interstate commerce or not, to file with the collector of internal revenue the gross and net earnings and certain other information. From this information an assessment was made upon corporations having a net income of over five thousand dollars. In 1910 this tax produced over twenty million dollars. But in addition to the revenue produced the tax forced the corporations to give important information, which may be made public if the president so orders. In fact it was asserted that the information acquired, with the possibility of publicity, would enable the government to exert considerable control over corporations.

ADMINISTRATIVE CONTROL OF TRUSTS AND COMBINATIONS

The Federal Trade Commission

Although the Sherman Anti-Trust Act proved a drastic destroyer of combinations, and although the Bureau of Corporations did good work in bringing to light abuses, some method of regulation was desired which should be at once regulatory and constructive. In transportation this has been accomplished by the Interstate Commerce Commission with its enlarged powers. It was suggested that the same idea be applied to industry and trade. By the act of September 24, 1914, a Federal Trade Commission consisting of five members, serving for five years, was established. Unfair methods in competition and commerce were declared unlawful, and the Commission was empowered to prevent persons and corporations from employing such methods. Banks, which are now responsible to the Federal Reserve Board, and common carriers, which are under the regulation of the Interstate

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[1] See p. 451.

Commerce Commission, were excepted from the jurisdiction of the new Federal Trade Commission. The Commission was directed to make investigation of complaints of unfair business methods or to investigate on its own initiative. Whenever it shall become convinced that any person, partnership, or corporation is using unfair methods, it shall serve a complaint upon the offender and, after hearings, issue an order directing the offender to abstain from the act complained of. The Commission may appeal to the Circuit Court of Appeals for the enforcement of its orders, and its decisions and orders are also reviewable in that court upon appeal. The findings of the Commission, however, if supported by testimony, are conclusive, that is, binding upon the court. It is important to remember that this Commission, unlike the Interstate Commerce Commission, has little constructive power. Its orders and decrees do not relieve a corporation from the penalties of the Sherman Law as interpreted by the courts in the decisions just examined.

Achievements of the Federal Trade Commission

In the few years that the Commission has been in operation it has accomplished a great deal. Part of its work in the nature of investigation and publication of the information has been severely criticized but, nevertheless, something has been accomplished. Another function, which receives less publicity and whose importance is little realized, is the remedying of abuses, sometimes of a very minor nature, and putting an end to unjust complaints. In thus acting, the Commission has adopted the following procedure: A complaint is received, and the other party notified of it. If it is remedied, as it frequently is, the matter is ended. Some questions, however, require discussions by the Commission, in which the law upon the case is examined and expounded. As a result a "conference ruling" is made, which in the majority of cases ends the matter. If, however, the Commission finds that the principle involved is of great importance, it may make its own investigation, hold hearings upon the formal "complaint," and as a result issue an "order." The great advantage which this procedure has shown is that it furnishes a quick and inexpensive method of remedying wrongs, that it avoids litigation, and makes clear the true principles of the law.

The Clayton Anti-Trust Act

The decisions of the court concerning trusts and combinations which have just been examined were somewhat modified and the entire subject of trust legislation revised by the passage of the Clayton Act, October 15, 1914. The twenty-five sections of this act can be most conveniently grouped under six divisions.

(1) Price discrimination forbidden

Price discrimination is forbidden when such discrimination would tend "substantially" to lessen competition or create a monopoly. Price discrimination does not, however, prevent discrimination in price because of grade, quality, or quantity, or cost of selling, or discrimination between communities made in good faith to meet competition. Neither does it prevent persons engaged in selling goods from selecting their own customers in bona fide transactions and not in restraint of trade.

[Price discrimination as interpreted by the court]

In the case of the Great Atlantic and Pacific Tea Company against the Cream of Wheat Company, decided July 21, 1915, this action has received judicial interpretation. The Cream of Wheat Company advertised that it would not sell to retailers or directly to the consumers but only through wholesalers and jobbers. It also recommended that the retail price to the consumer be fourteen cents a package. The Great Atlantic and Pacific Tea Company was at first treated by the Cream of Wheat Company as a wholesaler, notwithstanding that it sold directly to the consumer. In 1915, however, the Great Atlantic and Pacific Tea Company advertised Cream of Wheat at less than the recommended price, whereupon the Cream of Wheat Company refused to sell any more of its product to the Great Atlantic and Pacific Tea Company. The Great Atlantic and Pacific Tea Company thereupon asked for an injunction against the Cream of Wheat Company, on the ground that its action was in violation of both the Sherman Law and the Clayton Act. In the District Court Justice Hough in refusing to grant the injunction said:

> Section 2 [of the Clayton Law] plainly identifies the lessening of competition with restraint of trade. . . . But price discrimination is only forbidden when it "substantially" lessens competition. Construing the whole section together the last section reads in effect that a "vendor may select his own bona fide customers providing the effect of such selection is not to substantially and unreasonably restrain trade."

> How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such an advertisement-begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension.[1]

The Circuit Court of Appeals at New York upheld the action of the lower court in refusing the injunction, basing its ruling on the fact that the Cream of Wheat Company had the right to refuse to sell to retailers, and that the Great Atlantic and Pacific Tea Company was a retailer.

This interpretation, if followed by the Supreme Court may somewhat modify the reasoning already explained in the Miles case. It tends to show that the lower courts, at least, regard the Clayton Act as allowing price fixing, provided such price fixing does not "substantially" lessen competition.

(2) Sale of patented articles

The third section of the act is in the nature of the legislative revision of the decision in the Dick case.[2] It will be remembered that the court there held that the vendor of a patented article might sell his article on the condition that only such other articles as he specified were used with it. This section prohibits the selling or leasing of articles, whether patented or unpatented, on the condition that the purchaser or lessee shall not use goods or supplies of a competitor where the effect of such a condition would be to lessen competition substantially or to create a monopoly. There is room for judicial interpretation as to whether or not a specific conditional lease does actually lessen competition substantially; but the purport of the section is to sustain the dissenting minority in the Dick case and to uphold the reasoning of the majority in the Sanatogen case.

[Dick case reversed]

It also should be remembered that the court has specifically reversed its ruling on the Dick case, and that upon independent reasoning and not upon this section of the law.[3]

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[1] American Year Book (1915), pp 349, 350 See also an exhaustive discussion of this case by Sumner H Slichter, "The Cream of Wheat Case," *American Political Science Quarterly*, Vol. XXXI, p. 392.

[2] See p 511.

[3] See p. 513.

(3) Application of anti-trust laws to labor organizations forbidden

Section 6 is aimed at a recall of the decision in the Danbury Hatters case.[1] In this case it will be remembered that the anti-trust laws were invoked against a labor union in the case of a boycott. In the Clayton Law it is specifically declared "that the labor of a human being is not an article or commodity of commerce," and that "nothing contained in the anti-trust laws shall be construed to forbid the existence of labor, agricultural, or horticultural organizations from carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

(4) Consolidations and combinations

Corporations engaged in commerce are forbidden to acquire the whole or a part of the stock of other corporations where the effect would be to lessen competition substantially. Exceptions are allowed in the acquisitions of stock for investment and not for the purpose of control; and in the formations of subsidiary companies and feeders for the lines of common carriers.

(5) Interlocking directorates

Investigation showed that many banks and corporations, nominally in competition, had boards of directors containing many of the same persons. Moreover, certain companies sold securities to or bought supplies from banks or corporations which had large representation upon both boards. Sections 8 and 10 of the Clayton Act attempt to check this.

(6) Enforcement

Any person who is injured by anything forbidden in the anti-trust laws may sue in the court of the district where the defendant resides, or is found, or has an agent, without respect to the amount in the controversy, and may recover threefold damages and a reasonable attorney's fee if his suit is sustained. The carrying out of the administrative provisions of the act are vested, for banks, in the Federal Reserve Board; for common carriers, in the Interstate Commerce Commission; for other corporations, in the Federal Trade Commission. Cases are taken directly to the Circuit Court of Appeals, which is directed to expedite them and give them precedence.

In both the Trade Commission Act and the Clayton Act, the Commission and the court are forbidden to relieve or absolve any person from any liability under the anti-trust laws. Thus

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[1] *Loewe* v. *Lawlor*, see p 508.

Effect of the Trade Commission and Clayton Act on business

it would appear that the policy of the government is still largely of a prohibitive or negative nature and that little advance has been made towards providing a body which can engage in constructive regulation. Such a commission should be able to do what the court has done in applying the rule of reason, namely, authorize harmless or beneficial combinations, perhaps allow price fixing in cases where it seemed beneficial, and have power to approve of practices which it deemed were not unfair. As it is, the order of the Commission gives no legal immunity. The case may be carried to the courts and the same principles applied as in the application of the Sherman Law. In one sense, however, these laws are of great importance and advantage. They provide for close and frequent supervision, and the mere publicity of their investigations and hearings will do much to prevent unfair practices and perhaps to influence public opinion in favor of a more constructive policy.

CHAPTER XX

THE EXERCISE OF THE POLICE POWER BY THE FEDERAL GOVERNMENT

The police power

The Supreme Court has briefly defined the police powers as "... nothing more nor less than the powers of government inherent in every sovereignty ... that is to say, ... the power to govern men and things."[1]

The police power inherent in the states

The federal government, being one of delegated powers and this power not being delegated, it is consequently left with the states. It cannot be taken from them, either in whole or in part, and exercised by Congress. All that the federal government can do is to see that the states exercise this power under the limitations of the Constitution and do not, under the guise of exercising it, encroach upon the field granted to the national government.[2]

Congress may exercise the police power in those fields delegated to it

But if the police power be the power of government, Congress must possess this power in the fields which are delegated to it for control. Congress, therefore, while possessing no general police power, has, in exercising its right of controlling commerce and the other functions granted to it, the right to enact measures for the government of these functions; and these measures may affect the health, safety, and morals not only of persons engaged in the conduct of these functions but of the people at large. Thus, while it seems unlikely that Congress could, for example, establish a universal eight-hour day for all persons engaged in industry, yet it can place and has placed limitations upon the hours of labor of those engaged in interstate commerce. So also while a state has not the power to prevent the immigration of the Chinese, yet Congress through its control over immigration has not only excluded the Chinese but has enacted regulations for the protection of immigrant women after they have settled within the states. Again, although Congress cannot prevent the publication of obscene or libelous matter, it may exclude the same from the mails.

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[1] *License Cases*, 5 How. 504, 583.

[2] See T. M. Cooley, Limitations (6th ed.), pp. 705–707.

Congress may not exercise the police power generally but only in those fields it controls

A very considerable number of statutes have been passed in which it appears that Congress is exercising a federal police power. On examination, however, it will be found that this police power is never exerted because Congress possesses such a general power but solely because Congress has been given certain fields of action, in which, having absolute power, it may legislate concerning the health and morals of the people in those fields. In other words, within the fields of delegated powers Congress may exercise a police power.

Without attempting to enumerate all these statutes the following classification will show the extent to which legislation of this kind has been carried.

GENERAL POLICE REGULATIONS FOR THE CONDUCT OF INTERSTATE COMMERCE

Interstate commerce legislation

Under this head would naturally be found all the legislation concerning interstate railroads, rates, and rebates, and the antitrust laws, the latest example of which is the Clayton Act. These have just been discussed in the previous chapter and need not be reexamined. They were passed under the power of Congress to regulate commerce but contain, none the less, many provisions which are in the nature of pure police regulations.

POLICE REGULATIONS CONCERNING THOSE ENGAGED IN INTERSTATE COMMERCE

(1) The Safety Appliance Act

An example of the legislation concerning those engaged in interstate commerce is found in the Safety Appliance Act of 1893 with its various amendments. This act, which originally required that all trains employed in interstate commerce should be supplied with certain automatic safety appliances, was sustained in 1904 and 1907.[1] In 1903 an amendment applied the provisions of the act to all trains and vehicles used on any railroads engaged in interstate commerce. In 1911 the court, in upholding the amended act, said:

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[1] *Johnson* v. *Southern Pacific R. R. Co.*, 196 U.S. 1; and (1907) *St. Louis, Iron Mountain & Southern R. R. Co.* v. *Taylor*, 210 U.S. 281.

[Upheld by the court as applying to both interstate and intrastate commerce because of the interdependence of the two]

> We come then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic. . . . Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? . . . Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. . . . Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others.[1]

(2) Employers' Liability Act of 1906

In 1906 Congress passed an act intended to alter the old common-law relations between employers and their employees. The statute made interstate carriers liable for damages for the death or injury of "any" of their employees resulting from negligence on the part of the employers, or the insufficiency of the equipment; it altered the old common-law rule in that it allowed the employee to recover, although the injury had been the result of negligence on the part of another employee or upon his own part. This act applied to "any" employees in every carrier engaged in interstate or foreign commerce.

[Held unconstitutional by the court]

In 1907 the court held that although Congress had the power to alter common-law rules concerning the relation between employers and their employees, the act under consideration, in applying its regulations to "any" employee and to "any" of the officers of the carriers, touched not only those engaged in interstate commerce but also those who were engaged in purely intrastate commerce. The act was therefore a regulation of intrastate commerce which was beyond the power of Congress to make, and therefore invalid.[1] This decision, coming in 1907, four years before the Safety Appliance Act decision just examined, was a five-to-four decision, and represented a condition of the court which was quite common before it attained greater unanimity with the appointments made by President Taft.

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[1] *Southern Railway Co.* v. *United States*, 222 U.S. 20, 26, 27.

[Act of 1908]

In 1908 Congress attempted to meet these objections and reenacted the law of 1906, making it apply only to those injuries suffered by employees while engaged by an interstate carrier in interstate commerce. In this form the law was upheld by a unanimous decision in 1911. It was there said:

[Power of Congress to regulate commerce extends to every instrument and agent of commerce]

> This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

The court then shows that employees do have such a real and substantial relation to commerce and holds that

[Congress may regulate the relation of railroads to their employees engaged in interstate commerce]

> Congress may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.[2]

(3) Limitation of hours of labor

In 1907 Congress passed an act limiting the hours of the various classes of labor employed upon interstate carriers. These limitations varied from nine in twenty-four for those employed as dispatchers to sixteen in twenty-four for trainmen. Various periods of rest were also required. This law was claimed to operate not solely upon interstate commerce but upon intrastate commerce as well. In upholding the law, Justice Hughes said upon this point:

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[1] *Howard* v. *Illinois Cent. R. R. Co.* (the Employers' Liability Cases), 207 U. S. 463.

[2] *Mondou* v. *N. Y., N. H. & Hartford R. R. Co.* (Second Employers' Liability Cases), 223 U. S. 1, 47, 48, 49.

This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. . . . The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. The question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection of life and property necessarily depends. . . . And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations.[1]

[Congress may regulate hours of service of those engaged in interstate commerce]

[This regulation may not be defeated by the requirement of intrastate duties]

In 1916 Congress was forced to carry this principle even farther. A general strike on all the railroads of the country was threatened, and neither the roads nor the unions could come to an agreement. At the urgent request of President Wilson Congress passed the Adamson Act, which fixed eight hours as the standard for a day's work, directed that a committee be appointed to investigate the question of wages, and enacted that pending the report of such a committee and for thirty days thereafter the compensation of railroad employees be not reduced below the rate then in force. The law was thus a law fixing the hours of labor and the wages as well. Had Congress this power? The court in 1917 held that it had.[2] In the majority opinion prepared by Chief Justice White it was said:

[The Adamson Law of 1916 fixed both hours and wages]

. . . That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and

[Railroads are public business, subject to public regulation]

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[1] *B. & O. R.R. Co.* v *Interstate Commerce Commission*, 221 U.S 612, 618, 619.

[2] *Wilson* v. *New*, 243 U.S 332, 347-348.

protect it, is settled by so many decisions, . . . as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view, that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted.

[The employer and employee may come to an agreement as to wages]

[In case of failure so to do Congress may fix wages to avoid injury to interstate commerce]

(4) Arbitration

An act of 1888, replaced by acts of 1898 and 1913, provided for a system of arbitration in cases of serious labor disputes. It is to be noted that the use of the machinery here created is not obligatory, nor have the Board of Mediation or the boards of arbitration any compulsory power. There are no cases, therefore, on which the court could express its opinion as to the constitutionality of such an act. Nevertheless the Board has done good work. It consists of a Commissioner of Mediation and two other officials who, when an interruption of interstate traffic is imminent, may offer their services, or act upon the application of either party. The Board attempts to bring about a settlement of the dispute, but failing in that, attempts to induce both parties to agree to arbitration. If this is done a board of arbitration of three or six members is appointed, both parties signing agreements to continue in peaceable relations until the award is made. Within ten days after the filing of the award either party may appeal to the Circuit Court of Appeals. This procedure has been highly successful. In 1913 the Board settled an impending railroad strike and has had equal success in averting others, although it failed in 1916.

(5) Membership in labor unions

The act just considered made it a crime for an employer to discriminate unjustly against an employee of an interstate carrier because of his being a member of a labor union. In reversing a conviction of a lower court, and dismissing the case because of the unconstitutionality of the law, Justice Harlan said :

[Court holds that there is no such relation between interstate commerce and membership in labor unions as to allow Congress to make it a crime to discharge a man for such membership]

> . . . Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under the power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated . . . we hold that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent or an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, *or only* those who are *not* members of such organizations, — a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce.[1]

POLICE REGULATIONS FOR THE GENERAL PUBLIC

Police regulations for general public

Legislation of this class is the most dubious of all the so-called police legislation passed by Congress. It is obvious to say that the conduct of interstate business can be naturally regulated by Congress, and it is logical to hold that the control of commerce may include the regulation of the instrumentalities of commerce ; thus the kind of legislation just considered may be regarded as reasonable regulations. But the class of legislation now to be considered deals not so much with the commerce itself as with the effect such commerce would have upon the public. Since, moreover, this effect is always operative within state lines, legislation of this sort most seriously interferes with the police regulations of the various states. Nevertheless, it is in this field that the most recent and far-reaching powers have been exercised. Certain typical statutes with the decisions of the court may be taken as examples.

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[1] *Adair* v. *United States*, 208 U. S. 161, 178–180.

(1) Food and Drugs Act

In response to popular demand, excited partly by investigations and partly by sensational charges, Congress in 1906 passed the Food and Drugs Act. This act was designed to guarantee the purity, character, quality, and quantity of food and drugs. It prohibited the use of deleterious preservatives, required the inspection of all meats, the analysis of all drugs and compounds, and a correct branding of the article, together with its net weight and a statement whether it contained preservatives or certain dangerous habit-forming drugs. This most extensive police regulation was passed in accordance with the power of Congress to regulate commerce. All adulterated or misbranded articles were denied access to commerce, both foreign and interstate, and heavy penalties were prescribed for those who should violate the provisions of the act.

[Although upheld by the court interpreted so that fraud was possible]

The constitutionality of the law was affirmed in 1910.[1] But certain sections of the law have been so interpreted by the court as to require amendment. This was particularly true of section 8. This declares that an article should be deemed to be misbranded when "the package or label . . . shall bear any statement, design or device regarding such article . . . which shall be false or misleading in any particular. . . ." In applying this section the lower court was upheld by the Supreme Court in its contention that false and misleading statements referred to the identity of the drugs rather than to the curative properties of the compound.[2] Hence the door remained open for quacks and purveyors of nostrums to make false and misleading statements concerning the curative qualities of their preparations and thus to stimulate their sales.

[Amendment of 1912 prohibited false statements of curative properties]

As a result the law was amended in 1912, punishing as misbranding "any statement, design or device regarding the curative or therapeutic effect of such an article . . . which is false and fraudulent." This was upheld by the court in 1915.[3] This case involved the following label, "Effective as a preventative for Pneumonia. We know it has cured and that it has and will cure Tuberculosis."

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[1] *Hipolite Egg Co.* v. *United States*, 220 U. S. 45.

[2] *United States* v. *Johnson*, 221 U. S. 488.

[3] *Seven Cases* v. *United States*, 220 U. S. 510

[Upheld by the court]

After disposing of various technical objections, Justice Hughes, who had dissented in the Johnson case just cited, met the contention that the act deprived the owners of their property without due process of law. This contention was made upon the ground that the statute entered "the field of opinion and by virtue of consequent uncertainty operated as a deprivation of liberty and property without due process of law. . . ." Justice Hughes reasoned as follows:

> It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease when he knows it is not, is beyond the reach of the law-making power. Congress recognized that there was a wide field in which assertions as to the curative effect are in no sense honest expressions of opinion but constitute absolute falsehoods and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.[1]

Other sections of the law have been uniformly upheld by the court, and the statute has proved most beneficial. Although it is an obvious exercise of the police power, yet its operation has such a natural connection with the commerce clause, through which it acts, that little objection can be found to the reasoning used by the court to uphold it. It is true that it does involve some encroachment upon the field of state regulation and forces state laws to conform with it, yet popular opinion has enthusiastically supported this encroachment.

(2) Lotteries and lottery tickets

In 1895 Congress prohibited the transfer of lottery tickets by means of interstate carriers. In 1899 one Champion sent by express a box containing two such tickets from Texas to California, whereupon he was arrested, tried, and found guilty. On appeal to the Supreme Court the constitutionality of the act was questioned but upheld by the court. In coming to this decision the court made an exhaustive survey of the decisions concerning the regulation of commerce, particularly those laws which seemed to be police regulations.

[*Champion v. Ames*]

It was held by the. counsel for Champion that the test of the validity of the statute was its real not its apparent object; and that the one under consideration was not to regulate commerce but to suppress lotteries; that commerce meant commercial intercourse, and that lottery tickets were not articles of commercial intercourse; and that the suppression of lotteries was a police function which Congress did not possess. After examining the previous cases, many of which have just been discussed, the court came to the conclusion that commerce meant intercourse or traffic in its widest sense, and thus:

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[1] *Seven Cases* v. *United States*, 239 U. S. 518.

[Lottery tickets are subjects of commerce]

> We are of the opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.[1]

The court then reaffirmed the reasoning that the power to regulate included the power to prohibit, and asserted that no one was deprived of his liberty by such a prohibition:

[No one has the liberty to introduce into commerce an element injurious to public morals]

[Congress may make it a criminal offense to introduce lottery tickets into interstate commerce]

[Lotteries held to be injurious to public morals]

> But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element confessedly injurious to the public morals. . . . As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. . . . If the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of the opinion that an effective regulation for the suppression of lotteries carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.[2]

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[1] *Champion* v. *Ames*, 188 U.S. 321, 354.

[2] Ibid. 188 U. S. 357-358

In answer to the contention that, if Congress possessed the power to exclude lottery tickets from commerce, this power might be used arbitrarily, the court said:

[The court will prevent arbitrary use of this power by Congress]

> It will be time enough to consider the constitutionality of such legislation when we must do so. . . . We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. . . . If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people.[1]

[Significance of this decision:

(*a*) By the power to regulate commerce Congress possesses a police power over the morals of the people

This decision is most far-reaching. It contains an assertion that Congress actually does possess a police power, through the means of interstate commerce, over the people of the United States. Other laws have been examined which exercised the police power over methods of conducting commerce, or over those engaged in that commerce, and statutes have been upheld in which the police power was utilized to prevent traffic in articles which were deleterious or dishonest in themselves. This decision goes even farther and asserts that Congress has the power to make regulations for the morals of the people by denying interstate commerce facilities to such articles, harmless in themselves, as may be used for purposes which Congress holds are "confessedly injurious to the public morals." Although technically not intrenching upon the police power reserved to the states, to regulate for themselves the morals of their citizens, this decision actually does so. With the enormous development of commercial intercourse and the inextricable mingling of intrastate and interstate commerce, to deny to any form of traffic the access to interstate commerce is practically to prohibit and suppress that traffic. This is what the law did. The reasoning of the court, logically following the precedents in previous cases, upheld this law, but in so doing allowed a wide extension of the power of the national government. Not merely was the power of the national government extended but it was

(*b*) Extension of power of Congress into field of private morality extended into fields hitherto regarded as belonging peculiarly to the states — the field of private morality.

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[1] *Champion* v. *Ames*, 188 U S 362–363.

(c) Court will decide whether Congress has acted properly]

In another particular this decision is interesting. If Congress may declare lotteries immoral and deny them access to interstate commerce, may not Congress continue to extend this power until it "arbitrarily excludes from commerce among the states any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare that it shall not be carried from one state to another"? The answer to this question has been given by the court. The Constitution limits this right and the courts will enforce those limits. But in the light of later decisions to be examined it may well be wondered what these limits actually are when subjected to judicial interpretation. To many this decision seems to have gone beyond all reasonable interpretation of the constitutional limits prescribed by the Constitution.

(3) Immigration laws and the protection of immigrant women

The right of Congress to control immigration into the United States has already been discussed. But Congress has gone even farther. In 1907 a law was enacted for the purpose of protecting immigrant women, by which it was made a felony for any person to keep, maintain, or control, for an immoral purpose, an alien woman within three years after she had entered the United States.

In 1908 the court held this act unconstitutional because it was an exercise of the police power by means not delegated by the Constitution to Congress. In the course of the opinion it was said:

[In 1908 court held that Congress could not protect the morals of immigrant women]

> That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the states, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed by the framers of the Constitution.[1]

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[1] *Keller* v. *United States*, 213 U. S. 138, 148–149.

To this reasoning Justices Holmes, Harlan, and Moody dissented. To their minds it seemed that if Congress could forbid the entry and order the deportation of immoral women, it could punish those who cooperated in their fraudulent entry. The law to them was thus but a legitimate method of controlling immigration.

[The White Slave Act of 1910]

In 1910 the White Slave Traffic Act[1] attempted to meet the objections of the majority of the court. Agreements had been entered into by the United States and several of the European nations for the suppression of this traffic. Consequently Congress was able to take advantage of the suggestion made in 1908 by the court that some method of regulation might be allowed by treaty. Therefore section 6 of the act provides for the registration of certain information called for by the treaties. Failure to file this information is severely punished, and as deportation of the alien may follow the furnishing of this information it would appear that the traffic, as regards immigrant women, had received a severe blow.

But the law goes farther than this. It makes it a felony for any person knowingly to transport, or cause to be transported, or to persuade, entice, or furnish transportation for any woman or girl for an immoral purpose in foreign or interstate commerce. Thus the act brings the matter squarely under the jurisdiction of the commerce clause which has had such a far-reaching interpretation.

[Upheld by the court on the ground that commerce power is universal]

It was objected that the commerce clause was not broad enough to cover this case. This was quickly disposed of by the court in these words: "The power is direct; there is not a word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary."[2]

It was claimed that the law was contrary to the clause of the Constitution which guaranteed the citizens of each state the privileges and immunities of the citizens in the several states. To this the court replied:

> It is said that it is the right and privilege of a person to move between states, and that such being the right, another cannot be made

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[1] 36 Stat. at Large, 825.

[2] *Hoke* v. *United States*, 227 U. S. 308, 320.

[No absolute right to interstate commerce]

> guilty of the crime of inducing or assisting or aiding in the exercise of it, and "that the motive or intention of the passenger, either before beginning the journey, or during, or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. . . .[1]

This means that no one has an absolute right to interstate commerce, but that all persons and things connected with it are dependent upon the regulations of Congress.

It was next urged that the states, through their police power, had control of the morals of their citizens. To this the court answered:

[The act does not encroach upon the jurisdiction of the states]

> . . . There is unquestionably a control in the states over the morals of their citizens, and it may be admitted, it extends to make prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power, and if such power be exerted to control what the states cannot, it is an argument for — not against — its legality. Its exertion does not encroach upon the jurisdiction of the states.[2]

And finally the court said:

[Congress may adopt police regulations in the control of commerce]

> The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation among the several states; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.[3]

(4) The Child Labor Law of 1916

The doctrine laid down in the Lottery and White Slave cases has been applied by Congress to the question of child labor. In 1916 an act was passed prohibiting from commerce the product of any quarry or mine in which children under sixteen years of age were allowed to work; and all products of factories, canneries, and so forth, in which children under fourteen were allowed to work at all, and those in which children between fourteen and sixteen were allowed to work over eight hours a day or more than forty-eight hours a week. This bill on its face made no attempt to regulate commerce. It was a police measure, pure and simple, passed under the power which Congress possesses to regulate commerce. As has been shown, judicial interpretation allows regulation to include control and prohibition of commerce; and it is upon these interpretations that Congress relied.

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[1] *Hoke* v *Smith*, 227 U.S 320–321

[2] Ibid 321.

[3] Ibid 333.

[Held unconstitutional]

On June 3, 1918, the court in a five-to-four decision held that this act was unconstitutional. Part of the reasoning is as follows:

[Held that power of Congress was to control, not to destroy, commerce]

> In *Gibbons* v. *Ogden*, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power said, "it is the power to regulate; that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them, is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The Lottery case, the Pure Food Law, the White Slave cases are then examined, and the court continues:

[To prevent an evil regulation may involve prohibition]

> In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

[The law did not regulate transportation but child labor]

> This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. . . .

[Manufacture not commerce]

> Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal

are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.

[Congress may control commerce but not manufacture in the states]

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. . . .

[The law an invasion of local government]

In interpreting the Constitution it must never be forgotten that the Nation is made up of states to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. . . . To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power on the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.[1]

OTHER METHODS OF EXERCISING POLICE POWER

(1) Postal power

In order to make police regulations Congress has invoked the power granted by the Constitution[2] to establish post offices and post roads. Consistent interpretation has held that this includes the power to maintain, operate, and regulate the postal agencies of the United States. These are not confined to those "known or in use when the Constitution was adopted, but keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances."[3]

[Postal regulations exercising the police power]

The actual organization of the Post-Office Department, together with an account of its operation, has been discussed. But the grant has been held to include the power to regulate the postal service, and in the execution, of this Congress has exercised police power. Statutes have been passed prohibiting and closing the mails to immoral, indecent, scurrilous, and defamatory post cards; and to all matter of an obscene or immoral nature, and to all matter concerning lotteries or attempts to obtain money by fraudulent methods or false pretenses.

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[1] *Hammer* v *Dagenhart*, 247 U. S 251, 269, 270, 271, 272, 273, 275, 276. See a criticism of this decision in T. R. Powell, "The Child Labor Law, the Tenth Amendment and the Commerce Clause," in *Southern Law Quarterly* (August, 1918), Vol. III, pp. 175–202.

[2] Article I, Sect. viii, clause 7.

[3] *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S 1, 9.

In 1877 the constitutionality of the whole matter was discussed.[1] It was shown that Congress had from the establishment of the Post Office prescribed what should be mailable, and that this power had never been questioned, but that difficulties arose in its enforcement.

[Letters in the mail can only be opened by warrant]

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant. . . .
>
> Nor can any regulations be enforced against the transportation of printed matter in the mail . . . so as to interfere in any manner with the freedom of the press.
>
> Whilst regulations excluding matter from the mails cannot be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage, without warrant . . . they may be enforced . . . in other ways, as from the parties receiving the letters or packages, or from agents depositing them in the post office, or others cognizant of the facts. And as to objectionable printed matter, which is open to examination, the regulations may be enforced in a similar way. . . .
>
> In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for distribution of matter deemed injurious to the public morals.
>
> The only question for our determination relates to the constitutionality of the act, and of that we have no doubt.

[Regulations may apply to persons depositing mail or receiving mail]

[Congress may refuse to distribute matter deemed injurious]

[Fraud orders]

The constitutional principles thus laid down have been affirmed in subsequent cases. In regard to the issuance of the so-called "fraud orders" by the Postmaster-General, several questions concerning his administrative procedure have arisen which have been discussed, but the general principle has been sustained.

[Espionage Act of 1917]

In 1917 the Espionage Act[2] forbade the transmission of information concerning the national defense to enemies of the

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[1] *In re Jackson*, 96 U.S. 727, 733, 735, 736, 737.

[2] 65th Cong, Public Act 24, June 15, 1917.

[Trading with the Enemy Act] United States and the circulation of false reports and statements likely to interfere with the affairs of the United States, while the Trading with the Enemy Act[1] authorized the president to establish a censorship on messages between the United States and any foreign country.

[Postal power includes the power to protect the mails] The right to establish post offices includes the right to protect the mails. In 1894 it was held that the government might appeal to the courts for equitable relief (injunctions) or utilize force to prevent the unlawful and forcible interference with the mails.[2]

(2) The taxing power

Many of the internal revenue taxes have been levied only partially for revenue, and some were enacted for the express purpose of exercising police powers. Thus the imposition of an excise tax of 10 per cent upon all notes issued by state banks was not for revenue purposes but for the purpose of giving the new national bank notes the monopoly of the field. [Notes of state banks taxed 10 per cent] This act was upheld by the court on the ground that it was within the acknowledged power of Congress to levy such a tax, and that the judiciary could not impose limitations upon the acknowledged powers of Congress, and finally that it was a means of regulating the currency.[3]

[Matches] In 1912, under the title "An Act to provide for a Tax upon White Phosphorus Matches and for Other Purposes . . . ,"[4] Congress levied a prohibitive excise tax of two cents a hundred, thereby effectually preventing the manufacture or export of such matches — a thing impossible under the power given to regulate commerce. Although the constitutionality of this act has not yet been questioned, the court will have good precedent for sustaining it in its decision upholding a tax of ten cents a pound upon artificially colored oleomargarine.[5] [Oleomargarine] In this case the court examined at length other taxes of similar nature, and quoted with approval the words of Chief Justice Fuller regarding a similar tax of 1886:

> The tax before us is, on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of

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[1] 65th Cong., Public Act 91, October 6, 1917.

[2] *In re Debs*, 158 U. S. 564

[3] *Veazie Bank* v *Fenno*, 8 Wall. 533.

[4] 37 Stat. at Large, Part I, p. 81.

[5] *McCray* v. *United States*, 195 U. S. 27.

oleomargarine as and for butter its primary object must be assumed to be the raising of revenue.[1]

By the use of the doctrine thus established in these cases Congress might adopt many regulative measures in fields outside of those actually granted by the Constitution. It opens up the use of the taxing power of the government as a means for federal police regulation, and thus vastly extends the sphere of activity of the federal government.

[Child labor]

The attempt to prohibit child labor was again made in 1919. This time the taxing power of the government was invoked. The net profits of all mines employing children under sixteen and of all factories employing children under fourteen years of age were subjected to a tax of 10 per cent. This law is now before the courts, where its constitutionality is being questioned.

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[1] *In re Kollock*, 165 U. S 526.

CHAPTER XXI

FOREIGN AFFAIRS

Congress has large powers in foreign affairs

The direction of foreign affairs, as has been shown, is chiefly in the hands of the president and his appointees. Nevertheless, Congress in general, and the Senate in particular, exercises very important functions in determining how these shall be conducted. The whole Department of State is the result of congressional action, and the determination of the kind of representation the United States shall have and the salaries to be paid are all matters for Congress to decide. So, too, the assent of the Senate must be obtained for every appointment made by the president, and no treaty can be ratified without the consent of two thirds of the senators. Furthermore, most treaties require some money to carry into effect their provisions, and this can only be obtained by the joint action of both Houses. Thus no proper idea of the conduct of foreign affairs can be gained without remembering what has been said about the organization and procedure of both Houses of Congress. Furthermore, it should be emphasized that in foreign affairs, in sharp contradistinction to domestic affairs, the initiative is with the president, and what power Congress has can be used only affirmatively to carry out his plans or negatively in opposition to him.

THE AGENCIES BY WHICH FOREIGN AFFAIRS ARE CONDUCTED

The Secretary of State

The Department of State is the executive department which is charged with foreign affairs. At the head is the Secretary of State, sometimes called the premier, although he has none of the functions which are usually associated with that title. Legally he is on a par with the rest of his colleagues in the cabinet, and the department over which he presides is the smallest of all the executive departments. Nevertheless, because of the importance of foreign affairs, particularly during the first years after the organization of the government, his position is actually more weighty and influential than that of any other secretary. One reason for this is the great independence the president has in foreign affairs[1] and the confidential relation which the secretary must bear to his chief. Although less hampered by congressional interference than the other departments, the Department of State and its Secretary are more subject to presidential control than the other departments.

Character of appointees

Another reason for the importance of the Secretary of State is in the character of the appointees. At one period the position of Secretary of State was thought to be the stepping-stone to the presidency; at another brief period it was offered to the president's nearest rival for the party nomination; but in all these periods the secretaries have been men of national reputation and prominence. Their ability and experience may have been derived in diplomacy, administration, or in some profession in private life, or very often gained in politics. But from whatever source the experience has been gained, the secretaries have usually been the most influential men in the cabinet. The names of J. Q. Adams, Webster, Seward, Hay, Root, and Bryan will indicate the varied attainments which some of the more well-known secretaries have displayed.

Organization of the Department of State

For the conduct of foreign affairs the department is organized into three bureaus: the Bureau of Index and Archives, which takes charge of all the correspondence of the department and prepares the annual volume of foreign relations; the Diplomatic Bureau; and the Consular Bureau.

The diplomatic service

The diplomatic service of the United States has developed slowly and in many respects is lightly if not humorously regarded by other nations. At present it consists of thirteen ambassadors, and thirty-one ministers, accredited to the principal countries of the world.[2] In addition there are chargés d'affaires, secretaries of legations, and numerous minor officials and employees. Contrary to European custom the service is neither permanent nor progressive. The officials, as far down as the secretaries of legation, are presidential appointees, and all are subject to frequent

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[1] See p. 199

[2] Since the United States entered the World War there have been no ambassadors to Austria-Hungary, Germany, and Turkey

Presidential appointees, underpaid

change. Most of the appointments are regarded as rewards for political service, and the more prominent ones are the highest prizes at the disposal of the president. As the service is grossly underpaid — the ambassadors generally being compelled to draw heavily upon their private means — the charge has been made that such appointments are put at the disposal of the wealthy supporters of the party. Certain appointments would seem to give color to this charge. Nevertheless, presidents have attempted to give, if not a diplomatic tone, at least a somewhat cultured atmosphere to some parts of the service, and numerous men of the highest literary ability have occupied at one time or another important posts. Bancroft, Motley, Lowell, Irving, and Hay would equal if not surpass in literary ability the appointments of any other nation. The less important posts, however, are not so carefully filled. Here political influence has at times been almost unchecked, and appointments have been made which have reflected little credit upon the country.

Characteristics of highest ranks and of lower ranks

Lack of training and experience

The great reason for the low estimation in which the service is held abroad is the lack of training of the diplomats. Diplomacy has developed rules and an etiquette of which our representatives are sometimes lamentably ignorant. This is partly due to their lack of experience resulting from the constant changes in the service. The higher appointments are changed with every change of party, generally with every administration, and sometimes oftener. One exception, however, should be noticed in the case of George P. Marsh, who represented the United States at Rome from 1861 to 1882. During the administrations of Presidents Roosevelt and Taft some attempt was made to give a more permanent character to the service. By executive orders issued in 1905 and 1909 vacancies in the office of secretary of embassy or legation could be filled only by promotion or examination, and it was provided that the civil-service rules and the principles of the act of 1883 should be applied as far as possible to the foreign service. The intent was that entrance should be by examination, and that future appointments were to be in the nature of transfers and promotions, so that beginning as a secretary a young man might hope to become a minister or even an ambassador. President Taft carried out the principles

Attempts to give the service a permanent character

of this order to some extent, and a few minor posts of the first rank were filled as the result of promotion. Under President Wilson and his Secretaries of State the principle has evidently been temporarily abandoned. Three consecutive Republican administrations had filled the service with Republican appointees, whose promotion was not acceptable to the Democrats.

Duties of the diplomatic service

The duties of a member of the diplomatic corps may be considered under two heads: those to the United States and those to the country to which he is accredited. The first and most obvious duty of an envoy is to keep his home government informed concerning the special business intrusted to him, or any other matters which may arise in the regular course of affairs. This portion of his task might possibly be performed in a perfunctory manner, or even delegated to a subordinate, with perhaps little loss in efficiency to the service. A far more important function is that of keeping the government informed concerning the spirit, temper, and public and private opinion of the foreign country towards his own. Here is offered the greatest scope for skill and ability. The envoy must possess such a character and personality that he will be welcomed in circles influential in forming and directing public opinion. He must be able to distinguish temporary manifestations of approval or disapproval from the more permanent sentiments held by the leaders of the country, to gain but never betray confidences intrusted to him, and yet to portray to his home government an accurate picture of the underlying conditions. Thus Charles Francis Adams, minister to Great Britain during the Civil War, was able not merely to conduct the most difficult negotiations intrusted to him and report the same to the government but also, from his wide acquaintance with prominent English leaders, to keep the United States informed of the true condition of the public mind and often to give unofficial hints as to the possibilities of a certain line of action. In less troublous times John Hay occupied a similar post at the Court of St. James and performed similar functions.

Gain information

Aside from these general, important, although indefinite, duties which require the greatest skill and discretion, every ambassador has a multitude of routine duties which he must

Routine duties of a diplomatic agent

Protection of American citizens

perform. He must be prepared to offer the proper amount of protection to American citizens in trouble or danger. Two difficult questions here arise: Is a person claiming American citizenship actually a bona fide citizen, and to what extent is it wise to utilize force in protecting him? The first question arises from the naturalization laws of the United States and the practice of foreign countries. An alien takes out his first papers or even becomes a fully naturalized American citizen and returns to his native land. There he may be arrested and appeal to the American minister, upon whom devolves the decision of whether he is a bona fide citizen or not. If it is decided that he is a citizen, the minister must then decide what measures should be taken to protect him. These may go all the way from protest and a demand for his release to a threat of force. The protection of American citizens becomes a very complicated and important task when the country to which the minister is accredited is involved in war. Thus, at the outbreak of the World War in 1914 thousands of American citizens found themselves caught in Germany, without sufficient resources and in many cases under suspicion of being English subjects. It devolved upon the ambassador to relieve their most pressing necessities, to protect them, and to provide some means for their repatriation.

Finally comes the large number of demands which are made upon ambassadors and ministers by sightseers and travelers. At times it would appear as if the embassy were little more than a tourist office. Presentations at court are obtained through the agency of the minister, and not infrequently many troublesome questions arise and much heartburning is created in the attempt to satisfy all the demands.[1]

Duties of a diplomatic agent to the country to which he is accredited

The duties of the minister to the government to which he is accredited are also many and important. The first, perhaps, lies in giving a true representation of the opinion and policy of his own country. In this he is guided by the dispatches and notes from the Secretary of State which outline the course he is to follow in his official capacity. In presenting these notes, however, ambassadors act in more than a mere ministerial capacity. They may, as their judgment or good sense directs, soften or strengthen the force of the diplomatic language employed. They may, by means of "conversations," convey unofficially a message which prudence or fear of publicity would prevent being committed to paper. It is their duty at times by these means to inform the foreign government of the effect its action would have upon the United States. Perhaps the most often quoted example of such a warning is found in the note addressed by Charles Francis Adams to Earl Russell concerning the Laird rams, where he used the phrase, "It would be superfluous in me to point out to your lordship that this is war." When the country to which he is accredited is engaged in war, the American minister may be asked to take over the duties of some of the belligerent countries, and he may become the medium of communication between the two belligerents. Thus, until the United States entered the war, the American ambassador at Berlin had charge of the archives and carried on what was left of the duties of the British and French missions there.

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[1] See James Russell Lowell, Letters (ed C E Norton), Vol II, p. 99.

Special negotiations

One other set of duties which may be characterized as irregular or extraordinary includes those of special negotiations and service upon special missions. These are commonly connected with peace negotiations but may equally arise from any international crisis or for the establishment of some international agreement. Frequently a special mission unconnected with the regular minister is intrusted with this service, but sometimes the regular diplomatic agents are employed.

Executive agents

Another type of diplomatic agent which is occasionally utilized is the executive agent. When it seems unwise to recognize the government established by a revolutionary movement and yet it becomes necessary to obtain information and possibly to conduct negotiations with such a government, a special unofficial agent may be dispatched by the president. This agent is not an officer of the United States appointed by law — in fact, his functions are entirely extra-legal. He cannot be paid out of any fund other than the discretionary fund placed by Congress at the disposal of the president. During the Civil War there were several of these unofficial missions and agents dispatched to England, who sometimes greatly hampered or annoyed the regular minister.

The most recent examples of the employment of these executive agents have occurred in the Wilson administrations. In 1913, although refusing to recognize the government established by General Huerta, the president dispatched John Lind as his special envoy. During the World War, both before and after the United States became a belligerent, the president sent his personal friend, Colonel House, to Europe to obtain for him first-hand impressions and information.

The consular service

Another bureau of the department is charged with the consular service. This was first organized in 1792 but reorganized and systematized in 1856 and 1906. The service as organized before 1914 consisted of five consuls-general at large, who are advisory and inspecting officers; fifty-seven consuls-general, who are charged with duties of consuls but have supervisory powers over the consulates and consular agencies within their districts; two hundred and forty-one consuls, divided into nine classes according to salary; three hundred and fifty-seven vice-consuls; two hundred and thirty-seven consular agents, and other minor officials.[1]

Criticism of the consular service

Many of the criticisms of the diplomatic service would apply even more strongly to the consular service. Because less in the public eye it has been used even more often for political rewards, and the character of some of the appointments has been scandalous.

Improvements in the consular service

Beginning in 1895, however, a series of reforms was initiated in the attempt to raise the character of the service and to secure permanence and promotion. Entrance is gained by examination to the lowest grade and promotion by transfer is based upon grounds of efficiency evidenced by records kept in the bureau. This system was attacked even during the Republican administration in which it was established, but during the first months of the Democratic administration in 1913 the attacks were redoubled. The charges were that it was impracticable, and that, owing to the fact that the system of apportionment to states according to population was not followed, the South was deprived of its just representation. Nevertheless, Secretary Bryan resisted the attack and issued a statement that he was " entirely in sympathy with the purpose of the executive order governing appointments and promotion in the consular service."[1] The records prove his sincere desire to continue the improved system.

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[1] Cyclopedia of American Government, Vol. I, p. 449 These figures are typical of the organization before the World War.

Duties of consuls

The duties of consuls are varied and important and demand a wide range of ability and experience. Primarily they are commercial agents of the United States whose reports are supposed to give information concerning the possibilities of the development of American trade and commerce; they are also expected to keep the government informed concerning any legislation which might be detrimental to the policy or interests of the United States. They are charged with certain duties connected with the enforcement of the revenue and immigration laws of the United States, and in that capacity must sign invoices and clearances, and attest valuations of goods, and issue certificates. They are supposed to see that the navigation laws are complied with, that vessels sail with clean bills of health describing the condition of the passengers and crew and cargoes. They investigate disputes between masters of vessels and their crews, and send mutineers back to the United States; take charge of wrecked American vessels, shipwrecked crews, and passengers. They are also judicial officers, and act as probate judges and administrators of the estates of Americans leaving property within their districts, witness wills and marriages, and in certain countries have jurisdiction over civil and sometimes criminal trials to which Americans are parties.[2] In general they are supposed to give all necessary assistance and advice to American citizens resident abroad, and in times of war they may be called upon to protect both American citizens and neutrals.

METHODS OF CONDUCTING FOREIGN AFFAIRS

Presidential message

Our relations with other nations are conducted both directly and indirectly. The indirect method is by means of the presidential message to Congress. During the administrations of President Wilson this has been used very frequently. It has the advantage of informing foreign nations of the attitude of the administration without the embarrassments of a diplomatic communication. It is efficacious in proportion as it arouses the enthusiasm of the country and shows foreign countries the determined attitude of the nation.

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[1] American Year Book (1913).

[2] This exemption from the jurisdiction of local courts of the country applies to American citizens in China, Morocco, Muscat, and Persia Until recently it was in vogue in Japan and Turkey.

Diplomatic communications

Diplomatic communications are the usual direct method of conducting foreign affairs. These negotiations may be in the form of dispatches from the ministers or in notes sent to the ministers to be delivered to the representatives of the foreign state. Thus, before the United States entered the war, most of the negotiations with Germany were transacted through the German ambassador in Washington, while the greater part of the communications to Great Britain were sent to the American ambassador in London to be delivered to the British Foreign Office. Convenience, ability of the representatives, and their authority to conduct negotiations probably caused this distinction. Diplomatic documents may be official formal documents of protest and claims containing arguments to justify or prove the contention, or, on the other hand, the Secretary of State may in an instruction to the ambassador advise or recommend a course of action and direct that he inform the foreign country of certain things. This may be done either by delivering the communication as received, or the contents of the note may be given to the foreign state with such comments or explanations as the ambassador thinks necessary.

Diplomatic negotiations

Diplomatic negotiations involve the exchange of diplomatic communications or conversations. Each side states its position with arguments and evidence to support its contention. Sometimes the mere statement serves to remove the difficulties; in most instances, however, each side concedes some points, and an agreement is reached. Diplomatic negotiations vary from formal negotiation of a treaty to an informal agreement to follow a certain line of action in a particular instance. It is a mistake to assume that diplomatic negotiations all find their record in treaties; by far the larger part of the activities of diplomats is taken up with the settlement of minor matters and the removal of petty points of difference. In other words, diplomatic negotiations many times remove the necessity of proceeding as far as a formal treaty.

Treaties

Treaties may be of all sorts and kinds; in fact former Secretary of State Foster enumerates twenty-six different kinds of the more important treaties. In international law and diplomacy it may be proper thus to classify treaties as to their nature or the subject with which they are concerned, but for the purpose of discussing the operations of the government of the United States, a treaty is an international agreement or contract requiring the consent of the Senate. Agreements not submitted to the Senate are not treaties nor do they have the binding force given to treaties by the Constitution.

Negotiation of treaties

In the United States the treaty-making power is shared by the president with the Senate, and in some instances may require action by the House. A treaty or convention is said to be negotiated; that is, its terms are agreed upon and reduced to writing. The negotiators may be either the Secretary of State, diplomats in foreign countries, or special negotiators appointed by the president. In all cases the president has the initiative in opening the negotiations. In very rare cases the Senate or Congress has requested the president to open negotiations with foreign governments on specially indicated subjects.[1] The president, however, is by no means obliged to accede to such a request.

Relations of the president and Senate in the negotiation of treaties

Since the Constitution says that the president "shall have power, by and with the advice and consent of the Senate, to make treaties . . ." the question arises whether the Senate is associated with the president in the negotiations or only passes upon the completed work. Washington once presented a project of a treaty to the Senate in person, but with unsatisfactory results, for "they debated it and proposed alterations so that when Washington left the Senate Chamber he said he would be d—d if he ever went there again. And ever since that time treaties have been negotiated by the executive *before* submitting them to the consideration of the Senate."[2] Nevertheless, other presidents have formally consulted the Senate, although not in person, either before the negotiations or during the process. Although the formal consultation of the Senate is rare, informal discussion with certain leaders is very common. Since all treaties when submitted to the Senate are referred to the Committee on Foreign Affairs, it is of vital importance to obtain the approval of that committee. Failure to secure such approval may cause the treaty to be "pigeonholed" in the committee's archives, a fate which befell the important reciprocity treaties negotiated during the administration of President McKinley. Since, moreover, it may require some legislation to carry the treaty into effect, the chairman of the Committee on Foreign Affairs in the House may be consulted, and sometimes the Speaker and less frequently the chairman of the Committee on Appropriations. These consultations, however, are purely informal affairs and are in no sense a recognition of the right of anyone, save the president, to determine what treaties shall be negotiated or how the negotiations shall be conducted.

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[1] J W Foster, The Practice of Diplomacy, p. 275

[2] J. Q Adams, Memoirs, Vol. VI, p 427

The ratification of treaties

The ratification of a treaty already negotiated is a different affair and here the Senate stands upon its undisputed constitutional right. The process involves the submission of the treaty to the Senate and its reference to the Committee on Foreign Affairs. Here a delay may occur. If the chairman of the committee is opposed to the treaty or to the president, he may refuse to call a meeting to consider it; or if the majority of the committee are opposed to the treaty, they may delay action upon it or report, advising its rejection or its adoption with amendments. Technically, the Senate cannot amend a treaty. The acceptance of a treaty with amendments is equivalent to the rejection of the one already signed with the suggestion that new negotiations be commenced along the lines suggested by the amendments. In most instances the president and the foreign state have accepted the amendments. The Senate, however, has ratified without change by far a larger number of treaties than it has rejected or accepted with amendments.[1] Treaties are considered in executive session and debated in secret, but in 1888 the Fisheries Treaty with Great Britain and in 1919 the treaty to end the World War were considered in open session.

The Senate may not amend a treaty

One rather interesting point should be noticed in regard to the ratification of treaties, that is, the power of the Senate to ratify a treaty requiring the expenditure of money, which must be appropriated by the House. The question has been a vital one at least twice in our history; and in both cases the House, after more or less discussion and bluster, has made the appropriations. This is correct from the point of view of both constitutional and international law. Constitutionally, treaties duly signed and ratified are the supreme law of the land, and the House is morally bound to carry out their provisions. International law regards a ratified treaty as binding, and a failure to carry out its provisions constitutes a breach of its terms and gives grounds for claims and damages. This is exactly the point of view Jackson took when the French Chamber refused to make the appropriations called for by a treaty with the United States. He went even further and took retaliatory measures.

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[1] J W Foster, The Practice of Diplomacy, p. 276.

The House must appropriate money required by a treaty

The constitutional requirement that two thirds of the Senate must concur in the ratification of a treaty insures the support of the majority of the people of the country and effectually prevents secret diplomacy, that is, the binding of the government by agreements unknown to the legislature or to the people. Thus, in spite of the consideration of treaties in secret session and the power of the president in negotiation, diplomacy and the conduct of foreign affairs in the United States are much more under popular control than they are in England or in most countries of Europe.[1]

Secret diplomacy impossible

One kind of convention seems to prove the exception to the foregoing statement. This is the executive agreement.[2] These agreements vary from the settlement of claims as the result of diplomatic negotiations to agreements for arbitration,[3] to a protocol for a treaty, and even agreements establishing conditions ordinarily determined by most formal treaties.

Executive agreements

These executive agreements are made through the power of the president to appoint and control diplomatic agents, backed

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[1] In 1919, as has been said, the Senate considered the treaty to terminate the World War in open session.

[2] See J. B. Moore, in *Political Science Quarterly* (September, 1905), Vol. XX, p. 385; A Digest of International Law, Vol. V, p. 211; J. W. Foster, in *Yale Law Journal*, Vol. XI, p. 77.

[3] J W Foster, in "The Practice of Diplomacy," holds that no such arrangements have been made without the assent of the Senate, but Moore's "Digest," Vol. V, p. 211, notes fifteen such agreements.

Executive agreements do not require assent of either House

by his power as a general executive. He may thus, through his Secretary of State, direct an agent to agree to a certain course of action, and through his power as general executive, supported by his power as a commander in chief, carry out the agreement he has made. Unless an appropriation is required from Congress, or some legislative act made necessary by the new conditions created, or a case at law carried to the courts, his actions cannot be questioned.

Executive agreements frequently used

This method is frequently used for the settlement of minor points of dispute, particularly of claims. In 1899, however, General Bates negotiated an agreement with the Sultan of Sulu, by which among other things the sovereignty of the United States was recognized over the entire archipelago, protection was guaranteed, and the United States promised not to sell any island of the archipelago without the consent of the Sultan. These undertakings were confirmed by President McKinley and submitted to Congress for information, but the agreement was not submitted to the Senate nor was affirmative action taken by Congress upon it.[1] The most important international agreement entered into by the executive without the advice and consent of the Senate was the protocol of the treaty with Spain in 1898. This, on its face, was a mere protocol of a treaty, but its terms, in a measure, seemed to anticipate the definite peace. The executive agreement which has perhaps aroused the greatest antagonism was the one made by President Roosevelt in 1905 regarding Santo Domingo. A definite treaty had been negotiated and submitted to the Senate, by which the United States took charge of the customhouse, collected the revenues, and deposited them in banks in New York for the benefit of the creditors. The Senate, however, adjourned without ratifying the treaty. Whereupon, President Roosevelt proceeded to accomplish by executive agreement what he had attempted to do by means of a treaty. This agreement was continued until 1907, when another treaty similar to the first was ratified. During the early years of the World War the president entered into numerous agreements with the Allies, few of which were submitted to the Senate. Some of the few which are known deal with such important matters as loans, exchange of munitions and supplies, and the placing of the American forces at the disposal of the English and French commanders.

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[1] J. B. Moore, A Digest of International Law, Vol. V, p. 213.

Arbitration

Foreign affairs may be dealt with and international disputes may be settled by arbitration. By this method the two powers either choose arbitrators themselves, or leave the question to an umpire, or refer the dispute to an already organized court, such as The Hague. Usually the decision as to whether the case is to be submitted to arbitration is determined by a treaty in which the method of procedure is prescribed and the question carefully defined. In such a case the assent of the Senate is necessary. It has just been pointed out, however, that on several occasions questions have been submitted to arbitration by executive agreement alone. Agreements to arbitrate may be special or general. In a special convention, a definite question, usually carefully defined, is submitted to an arbitral board whose composition is determined by treaty. This practice has been followed since the establishment of the government, the first instance being in the Jay Treaty of 1794, by which three commissions were provided for to settle certain disputes with Great Britain. The most important instance, however, was the Geneva Arbitration, which settled the question of the damages resulting from the depredations of the *Alabama* and the other Confederate cruisers. More recent questions are those which have involved Canada and the United States, particularly the question of the fisheries, Alaskan boundary, and the fur seals. The United States has been a party to nearly a hundred such arbitrations. Since the first administration of President Wilson thirty treaties have been ratified, providing that before resorting to war the powers will submit any and all disputes to a commission of inquiry.[1]

TYPES OF DIPLOMATIC QUESTIONS AND QUESTIONS OF FOREIGN POLICY

Without attempting to write the history of the diplomacy of the United States or to discuss in detail its foreign policy, it is well to gain some conception of the kinds of problems which the

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[1] See p. 571.

Department of State faces and the methods used in their solution. The first and most numerous class would perhaps deal with individuals. Citizens of the United States may suffer wrong in their person or property at the hands of another state, or of the citizens of another state, and call upon the United States to protect them. In cases of this sort the usual course is for the Department of State to open diplomatic negotiations through the American ambassador. The facts are stated, and the demand is made. The foreign country may accede at once, or deny the claims, or urge justification for its action. In the first instance the question is usually settled by an executive agreement more or less formal; in the other cases the questions may be referred to arbitration or may involve a principle which necessitates settlement by a treaty. Thus the question of the status of naturalized American citizens who have returned to their native land began with individual instances which were subject to diplomatic negotiations, until finally certain principles were worked out which were embodied in treaties. A good example of this process is found in the settlement of the status of the naturalized Germans who returned to their native country and were arrested for failure to complete their term of military service. After numerous instances and the attempted settlement of special cases, a series of treaties was finally negotiated by George Bancroft, in which the American principles of naturalization were admitted, but in which it was provided that if the naturalized emigrant returned to his native land he should be liable for all offenses committed before his emigration. Treaties of similar tenor have been negotiated with the majority of the European states requiring universal military service.

Claims of individuals

Boundaries

Questions of boundaries have been frequent subjects of diplomatic negotiation. Some of these have been settled by negotiations or treaties, but from 1794 the United States has followed, with more or less consistency, the principle of referring these to arbitration. One of the most recent cases to be thus settled was the Alaskan boundary dispute with Canada.

In dealing with foreign nations frequent questions have arisen as to the treatment of revolutionary changes of government or even the separation of a portion of the state. These questions may be grouped around the policy of the United States regarding the recognition of insurgency, belligerency, independence, and the enforcement of neutrality.

Recognition of insurgency

"Insurgents are organized bodies of men who, for public purposes, are in a state of armed hostility to an established government."[1] The question which has confronted the United States many times is, Is a revolt against an established government actually and legally war? In other words, Do the laws of war apply in such a case and are both the parent state and the United States relieved from the ordinary obligations of the laws of peace? or, to put it more concretely, Are the revolutionists who are found upon the sea, insurgents or pirates? The Supreme Court, in interpreting the position taken by the executive, has said that there may be war in the "material sense" which, because belligerency has not been recognized, has not become war in the "legal sense." In other words, although the United States is compelled to admit that an armed conflict actually exists, it does not take the same position as it does when a state is belligerent or a legal state of war is recognized. This is well illustrated in the course pursued by the United States in dealing with the insurgents both in Brazil and in Cuba. In neither case did the United States concede to the insurgents the right of belligerents, that is, the right to make captures on the high sea and to seize contraband. The cruisers of the insurgents were not regarded as pirates but as lawful combatants, still the United States did not take the position of a neutral, for it did not allow these cruisers the hospitality of its ports nor did it allow its citizens to give the insurgents assistance.

Recognition of belligerency

> A *Status of Belligerency* [arises] when the insurrection has assumed the proportions of a public civil war in the legal sense, that is, when the war is waged by insurgents politically organized under a responsible government exercising sovereign powers over a definite territory and having the will and capacity to fulfill its neutral obligations.[2]

In recognizing such a condition the United States issues a proclamation of neutrality, warning its citizens to refrain from performing certain acts, aiding either side as a government, or showing partiality to either. For the purpose of conducting hostilities the United States recognizes that the insurgents have certain rights and privileges which are usually accorded only to independent sovereign states. It recognizes a legal state of war and thus allows the cruisers and vessels of war of the revolting community the same privileges in its ports as it does the naval forces of the parent state. It submits to search and capture of contraband by both belligerents and thus without doubt makes it more difficult for the parent state to suppress the revolt. Although it may make this recognition for its own protection, its action may be considered an unfriendly act by the parent state. Thus, during the Civil War, even after the North had recognized that a legal war actually existed, by issuing a proclamation of blockade, it was held that England had showed an unfriendly spirit in recognizing the belligerency of the Confederacy. In the course of the two long Cuban insurrections great pressure was brought to bear upon the executive to recognize the belligerency of the insurgents. This was not done, chiefly on the ground that no responsible government had been established. Had the United States recognized the belligerency, it would have been in a very different position at the close of the war from what it occupied after the Spanish-American War, when Cuba was raised to a semi-independent state under the protection of the United States.

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[1] Wilson and Tucker, International Law, p. 63

[2] A. S. Hershey, Essentials of International Public Law, pp. 121, 122.

Intervention has been defined as follows:

Intervention

> Intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, when it interferes in the domestic affairs of another state irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it.[1]

Intervention may be peaceful or warlike, may be exercised as a right based upon a treaty, or may be without right because of a question of policy. Intervention is a most serious step to take

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[1] W. E. Hall, International Law (7th ed.), p. 293. A briefer definition is given by L. Oppenheim, International Law, Vol. I, p. 188, "Intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things."

Intervention based on treaty rights

because the consequences are likely to lead to war. The United States has at least two treaties giving her the right to intervene in the affairs of other states. These are the treaty of New Granada of 1846, revised and rewritten as the treaty with Panama (1903), which gives the United States the right to intervene in that state when the transit across the Isthmus is threatened; and the treaty of Havana, 1903, which gives the United States the right to intervene for the preservation of the independence of Cuba and the maintenance of a government adequate for the protection of life, property, and individual liberty. Under the old treaty of 1846 with New Granada the United States intervened several times in the affairs of the Isthmus, once to establish the independence of Panama and again in 1904 to quiet disorders in the newly established state. So also the United States has intervened in Cuban affairs to preserve order and to aid in establishing a stable government.

Intervention without treaty rights

Intervention without treaty rights may be justified on various grounds. It is never a legal obligation but always a question of policy. Such intervention has been practiced by the United States many times, especially in dealing with the republics of Central America. Perhaps, however, the most noteworthy occasion was the intervention of the United States in Cuban affairs when, instead of recognizing the independence of Cuba or even the belligerency of the insurgents, the president demanded certain changes in Spanish policy which he was authorized to enforce by arms. Rather than comply, Spain declared war upon the United States, and upon the establishment of peace the United States obtained a protectorate over Cuba. More recently President Wilson has intervened in the affairs of Mexico, and, although he expressly disclaimed any intention of waging war, armed conflicts took place.

Recognition of independence

The recognition of the independence of a revolting community is another act which may involve the country in complications with foreign powers. The parent state is most loath to admit that a revolted community has achieved independence and is inclined to regard such recognition by another state as a hostile act. Thus England declared war upon France because of the latter's recognition of the United States, signified by a treaty of alliance in 1777. In its early history the United States set good precedents in exercising this right. Thus, in spite of the urgent demands of Congress, voiced by such men as Henry Clay, President Monroe refused to recognize the independence of the revolting Spanish-American colonies until it was evident that Spain could never hope to recover them. So, also, the independence of Texas was not recognized until a year after Mexico had ceased all attempts to reconquer it. In the case of the recognition of the independence of the Republic of Panama no such deliberation was exhibited. The revolt occurred at six P.M. on November 3, 1903; the next day United States marines were landed, and on November 6 Secretary Hay instructed the American consul to recognize the *de facto* government, and a week later President Roosevelt received a minister from the independent state of Panama.[1] Such haste showed that the whole episode should be classified as intervention rather than the recognition of an independent state possessing a definite territory, a responsible government, and showing evidence of permanence. As an example of intervention it might possibly be justified, but as a recognition of an independent state it violated all rules of international law and precedent. As such it was regarded as an unfriendly act by Colombia, the effects of which the Wilson administration has attempted to remove.

Lack of congressional power

It should be noticed that in all the foregoing questions it is the president and Secretary of State who act. Congress is practically powerless. It may be called upon to pass legislation to carry out a policy or to approve an already accomplished act; but the initiative and execution are in the hands of the president. Congress clamored for the recognition of the independence of the South American Republics and the belligerency of Cuba, even passing resolutions advising the same. President Wilson intervened in Mexico with the army two days before Congress passed the resolution of approval, and the whole Panama affair was consummated during a recess of Congress. When the action requires a treaty or an appropriation Congress or the Senate must be consulted; where such is not needed Congress can hope to do little more than to acquiesce in an accomplished fact.

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[1] J. H. Latané, America as a World Power, pp. 215–216.

QUESTIONS OF NEUTRALITY

Neutrality

Neutrality may be defined as "the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents."[1] To this should be added that the neutrality of a third state should be recognized by the belligerents, and the most correct definition would be "the attitude of impartiality adopted by third states towards belligerents and recognized by belligerents, such attitude creating rights and duties between the impartial states and the belligerents."[2] The development of the principles of neutrality and enforcement of the acceptance of this conception were largely due to the attitude of the United States. Thus, an English writer says:

> The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it went even further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations.[3]

Influence of the United States in the development of the doctrine of neutrality

Before the establishment of the independence of the United States there had been no consistent theory or practice of neutrality in Europe. Lip service was rendered to the idea, but the principles were ignored in practice. At the outbreak of the war between France and Great Britain in 1793 both belligerents, and particularly France, hoped to utilize the territory and resources of the United States for their own advantage and for the injury of their opponent. On April 19, 1793, Washington, after a cabinet discussion, issued a proclamation of neutrality, warning the citizens of the United States not to enlist in the forces of either France or Great Britain. When the French ambassador, Genet, arrived he proceeded to fit out and commission privateers, which made captures even within the territorial waters of the United States, and he sought to condemn these captures in prize courts established in the United States. Washington directed his Secretary of State, Jefferson, to protest against this course. In his letter of June 5, 1793, Jefferson laid down the correct principles which transferred the question from one of policy and privilege to a question of sovereign right. He thus wrote that it was "the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring powers," so "the granting of military commissions, within the United States, by any other authority than their own," was "an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country."[1] This was further amplified by a set of rules adopted by the cabinet, which the president attempted to enforce.[2] But the acquittal of Gideon Henfield, who was accused of enlistment on a French vessel, proved that the United States courts had no law to enforce which would cover such cases. Congress, therefore, in 1794 passed the first neutrality act, making it a criminal offense to perform certain enumerated acts which violated the neutrality of the United States. Other acts were passed from time to time, and in 1818, during the revolt of the Spanish-American colonies, the acts were carefully revised and form the basis for the present law, which was approved in 1909.

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[1] J T. Lawrence, The Principles of International Law (6th ed), p. 587.

[2] L. Oppenheim, International Law (2d ed.), Vol. II, p 361.

[3] W. E. Hall, International Law (7th ed), p. 632.

Position of the United States on neutrality during the World War

In accordance with this law in August, 1914, President Wilson issued a series of proclamations, declaring that since war existed all persons within the United States were warned that the performance of certain acts was prohibited by severe penalties. As general executive it was incumbent upon the president to see that the laws were scrupulously obeyed. Violations of these principles are not merely violations of the sovereignty of the United States but make the United States liable for damages to the belligerent who has suffered wrong. Thus the United States held Great Britain liable for her failure to preserve neutrality during the Civil War, and collected fifteen million dollars damages. In accordance with this policy President Wilson used his influence to prevent the departure of the submarines ordered by the British government, and, until the United States entered the war, enforced most impartially our neutral obligations.[1]

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[1] J. B. Moore, A Digest of International Law, Vol. VII, p. 886.

[2] Ibid. p. 891.

The enforcement of the rights of neutrals

The status of neutrality gives the neutral certain privileges. The neutral has the right to have intercourse with both belligerents, as far as he is not prevented by the laws of war applied in the right of search, seizure, and contraband, and the right of blockade. The executive of the United States thus has the duty of enforcing these neutral rights. Since both belligerents attempt to stretch as far as possible their belligerent rights and to interrupt or prohibit the commerce of neutrals with their enemies, the task is most difficult. Thus, during the Napoleonic wars both England and France violated the neutral rights of the United States and forced the executive to attempt to defend them by nonintercourse, embargo, and finally war. In the World War, England extended certain doctrines of contraband and blockade beyond all previous precedent. Against this the president ordered the Secretary of State to protest and to claim damages. In certain instances these protests were listened to and damages were paid. Germany, on the other hand, through the violation of the more fundamental principles of international law and humanity, and by her faithlessness to her pledges, forced the United States to retaliatory measures. The president after vainly attempting to secure the passage of an act authorizing him to arm merchantmen proceeded to do so on the basis of his power as executive. This proved insufficient, and war was declared.

Neutrality between a revolted colony and the parent state

In another circumstance the position of the United States concerning its neutrality is of vital importance. In the case of a revolted colony or province the question arises whether the United States shall recognize the belligerency of such a community and proclaim neutrality between it and the parent state. If this is done the United States is debarred from giving assistance to the parent state and from allowing it the exclusive use of the resources of the United States. On the other hand, the revolting community has as free access to the ports of the United States and may use the resources as freely as the parent state. In a civil war or revolt a declaration of neutrality is in fact of great aid to the revolting community. But whether of aid or not, it is sometimes a necessary step for a neutral to take in order to protect its own interest and to avoid being liable for certain acts of its citizens.

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[1] See letter of Secretary Bryan to Senator Stone concerning the enforcement of neutrality, Senate Executive Doc., 63d Cong., 3d sess., No. 716.

Enforcement of neutrality in the hands of the president

The question of whether a declaration of neutrality should be issued is entirely in the hands of the president. Congress has no power to make such a proclamation by resolution or to prevent the president from issuing such. Furthermore, the whole question of the enforcement of our neutral duties and rights is in the hands of the president. As regards acts committed within the United States he may have to rely upon laws passed by Congress, which he, as executive, must enforce. As regards our neutral rights on the high seas and in foreign countries he is the sole judge. As commander in chief of the army and navy he has ample power to enforce these rights, but this also carries the responsibility of involving the United States in war.

Position of the United States in Foreign Affairs

Isolation the ideal of the foreign policy of the United States

The ideal of the foreign policy of the United States may well be expressed by the word "isolation." This was voiced by Washington in his farewell address when he said: "Europe has a set of primary interests, which to us have none, or a very remote relation. . . . It is our true policy to steer clear of permanent alliances with any portion of the foreign world. . . ."[1] This idea was repeated by Jefferson in his first inaugural where he urged "honest friendship with all nations, entangling alliances with none" as the foundation of the foreign policy of the United States.

While these words undoubtedly express the American ideal and tradition, the actual course of foreign relations has been far different. From the very foundation of the colonies America has been involved in European affairs; its politics have reflected European politics, and its wars followed European wars.

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[1] J. D. Richardson, Messages of the Presidents, Vol. I, pp. 222–223.

Actual foreign policy has involved many conflicts with European powers

Indeed, the great Seven Years' War began with the collision of French and English frontiersmen in the backwoods of Pennsylvania. The achievement of the independence of the United States was aided if not made possible by European jealousies, and the French fleet made Yorktown the final victory for the Revolution. American trade and commerce were desired by both France and England, and only the weakness of the Articles of the Confederation prevented favorable treaties. The greater part of the territory now occupied by the United States was held by European states whose title must be extinguished by purchase, war, or negotiation; and the acquisition of the Louisiana territory was not unconnected with the failure of Napoleon's plans. Finally, being remote from Europe and uninterested in her dynastic struggles, the United States soon came to occupy the position of the most consistent neutral in the world. To define its position and defend the neutral rights it sought to enjoy, it was involved in a long series of diplomatic negotiations and finally in war. Thus, in its early history, far from occupying an isolated position, the United States was constantly involved in European quarrels and became the leader in the enforcement of at least one principle.

The maintenance of neutrality and the struggle for the freedom of the seas

Down to 1814 the most dominant characteristic of the foreign policy of the United States was the maintenance of neutrality, together with the establishment of the duties and privileges pertaining to a neutral, and the struggle for the freedom of the seas. In order to enforce her position in these contentions the United States has twice engaged in war, once with the Barbary pirates and once with Great Britain. The War of 1812, although fought with Great Britain, might as well have been fought against France. The underlying cause of the war was the right of neutrals to trade in noncontraband with both belligerents. Both France and England violated this right; indeed Napoleon displayed great cynicism and perfidy; but the outrages appealing to popular passions were committed by Great Britain. Impressment of American seamen stirred popular indignation more quickly than the seizure of American cargoes. Although the treaty of Ghent failed to settle the questions involved, both France and England in practice adopted the contentions of the

United States, which indeed became the foundation of the rules of international law until the World War of 1914.

The elimination of European powers from territory now governed by the United States

The elimination of European powers from the territory now governed by the United States was a task which occupied the administration throughout the first fifty years after the establishment of the government. The process began with the purchase of Louisiana in 1803, by which the navigation of the Mississippi came under the exclusive control of the United States. Vast but undefined territory was obtained.[1] To define this acquisition and round out the continental territory a series of negotiations, purchases, and arbitrations, and one war were required. The process began with the purchase of Florida from Spain in 1819. Unfortunately, the southwestern boundary was unsatisfactory — a condition which resulted in the independence of Texas, its annexation, and the subsequent war with Mexico. As a result of this war the United States obtained California and the territory north of the Rio Grande. In the extreme northwest and northeast there were boundary disputes with Great Britain. The northeastern boundary was finally settled in 1842 by the Webster-Ashburton treaty, while after the experiment in joint occupation the Oregon question was settled in 1846. In 1867 Alaska was purchased from Russia, which completed the territory held by the United States upon the continent. Since that time several disputes have arisen with Great Britain over the definition of the fishing privileges in the northeast, the fur seals in the northwest, and determination of the Alaskan boundary. These, however, have been settled by negotiation and arbitration.

The Monroe Doctrine; origin

The most peculiarly American foreign policy, however, is that contained in the Monroe Doctrine.[2] Historically this arose over the possibility that the Holy Alliance — a combination of Russia, Prussia, Austria, and France — would assist Spain in regaining her revolted colonies in South and Central America. Not unconnected with the announcement of the doctrine was the answer to Russia's attempt to extend her jurisdiction in the northwest. The message itself lays down certain rules which have guided the United States in its foreign relations and certain principles which the United States has attempted to enforce upon other nations.

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[1] In the treaty of 1803 France promised to cede the same territory that Spain in 1800 had ceded to France in these terms "with the same extent that it has now in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other States"

[2] See A B. Hart, The Monroe Doctrine.

The first and most fundamental of these principles is the doctrine of the two spheres of influence:

The two spheres of influence

> . . . In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. . . With the movements in this hemisphere we are, of necessity, more immediately connected and by causes which must be obvious to all enlightened and impartial observers.

This was but a statement of the principles held by Washington and Jefferson and the attempted policy of the government since its foundation. It rests upon the geographical division of the two hemispheres rather than upon actual fact. In the early years of the government Spain and Great Britain and at one time France held greater territorial possessions in the Americas than did the United States; while from the very first the commercial relations of the Americas to Europe prevented any absolute separation of interests. Nevertheless, until the time of the Spanish-American War it was a convenient doctrine upon which to base protests against European intervention in the Western hemisphere.

The American continents not open to further colonization by European powers

A second dictum closed the American continents to further colonization. This was found in the answer to Russia's claims, and is briefly and tersely stated in these words:

> . . . The occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers.

This did not mean that colonies already existing should be disturbed. Indeed Monroe was explicit upon that point: "With the existing colonies or dependencies of any European power we have not interfered and shall not interfere." Nor did it prevent combinations or disintegrations of the existing American states. This process began almost at once and continued throughout the nineteenth century. Finally it was not a self-denying ordinance to limit the expansion of the United States, as Mexico, Spain, and Colombia found to their cost. It was, however, a statement of the belief that for the safety of the United States no further European colonization should be allowed in America. It was based upon self-interest and self-protection, rather than upon idealistic grounds.

Mutual nonintervention

The doctrine of mutual nonintervention is in the nature of a *quid pro quo* and is based upon the doctrine of the two spheres. Although applied especially to Spain and the Holy Alliance it has been extended to cover intervention from other sources. In its enunciation, however, it was applied rather strictly to the colonies which had successfully revolted:

> But with the Governments who have declared their independence, and maintained it, and whose independence we have on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States.

From a statement thus limited the doctrine of nonintervention has been extended to prevent punitive actions which the United States considers unwise from her point of view. Thus the United States has become in a certain sense the guardian and sponsor for the good behavior of the Americas.

Finally, this protest was lodged against the political system of the Holy Alliance:

Nonextension of the political system of the Holy Alliance

> The political system of the allied powers is essentially different . . . from that of America. . . . It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form, with indifference.

If this meant the use of the Holy Alliance or any combination of powers against American states, it remains a principle of the policy of the United States to this day. But on the other hand, if it is aimed solely against monarchical institutions, as such, it has lost much of its force.

The effect of the Monroe Doctrine

The Monroe Doctrine was effective for the purpose for which it was enunciated. It prevented the Holy Alliance from giving aid to Spain in the attempt to recover her revolted colonies. It also answered Russia's pretensions in the northwest. But it has accomplished even more. In its original form and in the logical development of its ideas it has become the keystone of the policy of the United States toward South America. Thus it has prevented any extension of the existing European colonies and the establishment of new ones. It has prevented European nations from occupying territory, even temporarily, for punitive reasons. Thus the principles of the doctrine, although not its express words, were employed in 1866 to compel France to withdraw from Mexico, and in 1895 President Cleveland, invoking the doctrine by name, forced Great Britain to submit to arbitration a boundary dispute it had with Venezuela. Even at the outbreak of the World War Count von Bernstorff felt it necessary to assure the Department of State that should Germany come out victorious she would not seek expansion in South America. Subsequent revelations have cast considerable doubt upon the sincerity of this assurance.

The Monroe Doctrine a unilateral guarantee for the interests of the United States and for what the United States considers the interests of other American states

Under whatever name the principle may go it differs little from the principle of nonintervention. It means and has been successfully asserted that the United States will allow no intervention in American affairs contrary to what it considers its own interests. It does not mean that the United States denies itself the privilege of intervening or even of acquiring territory when its interests seem to demand it. Thus Mexico was forced to surrender California; and Spain, Porto Rico; and Colombia, Panama. Although apparently it would allow South American states to choose their own form of government, yet Presidents Roosevelt, Taft, and Wilson have determined the character of government for Santo Domingo, and President Wilson refused to recognize the government set up by General Huerta in Mexico. As applied to South

America it is a one-sided doctrine, protecting the interests of the United States and what the United States considers to be the best interest of the Americas.

Altered circumstances have changed the policy of the United States concerning nonintervention in European affairs

As regards the *quid pro quo* of the doctrine, that the United States would not intervene in European quarrels, circumstances have altered this policy. Until the close of the nineteenth century this principle was closely adhered to. Thus, although great sympathy was excited by the revolt of Greece in 1826 and of Hungary in 1848, the United States refused to intervene or to depart from its policy of recognizing the *de facto* government. The Spanish-American War changed this. As a result, the United States became a colonizing power in the European sense of the term, with colonies in both the Atlantic and Pacific Oceans which could never be raised to statehood. As such a power the United States was exposed to the jealousies of European powers and became increasingly involved in questions and disputes concerning colonial expansion and the exploitation of less civilized territory. Thus John Hay, when Secretary of State, negotiated an agreement with Japan and several European powers designed to secure the "open door," or equality of trade conditions, in China. In 1900 American troops were dispatched to China to rescue the legations from the Boxer rebels. This was perhaps the nearest to an alliance with European states that the United States had come before the World War. In other instances, such as the Hague treaties in 1899 and 1907 and the Algeciras conference of 1906, the United States disclaimed any intent "to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope."[1] Nevertheless, the United States, because of its size, resources, and possessions, occupies a very different position from that which it held in 1823. Irresistibly the United States has been drawn into the current of European questions. Thus the United States was drawn into the World War, and the influence which President Wilson exerted in the peace negotiations showed the altered position of the country in European councils. But the change from attempted isolation to active coöperation is by no means unanimously welcomed.

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[1] J. B. Moore, Principles of American Diplomacy, p. 440.

THE UNITED STATES AND INTERNATIONAL LAW

A leading authority thus defines international law:

> International law consists of certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.[1]

International law consists of rules enforced in the courts

International law thus does not consist of vague generalizations or desires but of rules which are enforceable in the courts of state. Thus, in the eighteenth century, Lord Talbot in enforcing international law held "that the law of nations, in its fullest extent, was a part of the law of England."[2] In 1784 a French citizen was tried, convicted, and sentenced by the Pennsylvania court because "the Law of nations" was "in its full extent" a "part of the law of Pennsylvania."[3] In 1793 Jefferson wrote to the French minister Genet, "The law of nations makes an integral part of the laws of the land"[4]; and in 1815 Chief Justice Marshall held that the court was "bound by the law of nations which is a part of the law of the land."[5]

Validity of rules of international law depends on practice

The rules which go to make up this code originated in custom, or treaties, or conference, or decisions of the courts, or contentions of various states which they have made good by war or diplomatic negotiation. The great and most decisive test of their validity is the sanction given them by acceptance and practice. Thus in 1899 the Supreme Court reversed the decision of the District Court and restored the proceeds of the sale of a vessel, with damages, on the ground that by the law of nations fishing vessels were not liable to capture as prizes in time of war.[6] This decision is interesting, not so much on account of the amount involved or even the importance of the principle of exempting fishing smacks as it is as an example of the application of the customary law of nations, unsupported by treaties, agreements, or statutes. Here the court unhesitatingly applied the principles of international law as set forth by writers and sanctioned by custom.

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[1] W. E. Hall, International Law (7th ed.), p. 1.

[2] *Triquet and others* v. *Bath*, J. B. Scott, Cases on International Law, p. 7.

[3] *Respublica* v. *De Longchamp*, 1 Dall. 111; J. B. Moore, A Digest of International Law, Vol. I, p. 10.

[4] J. B. Moore, A Digest of International Law, Vol. I, p. 10.

[5] *The Nereide*, 9 Cranch, 388, 423.

[6] *The Paquette Havana*, 175 U. S. 677.

Part played by the United States in developing international law

In helping develop international law the United States has played an influential part in several important fields. Hardly was the government established when the French Revolution brought renewed war between France and England. Because of its position as a neutral, desiring peaceful commerce with both belligerents, the United States insisted upon a liberal definition of the rights of neutrals,[1] but, with a sense of justice which does not always characterize nations in their conduct, she also assumed obligations far beyond those required at that date. As has been seen, the principles contended for by the United States have generally been accepted as the basis of the international law of neutrality. In like manner, the contention of the United States that free ships made free goods, which means that the neutral flag protects noncontraband commerce from seizure when on board a neutral vessel, and her contention that a blockade to be binding must be effective, were accepted by the Declaration of Paris in 1856. Because of the failure of this declaration to make all private property at sea safe from capture the United States refused to ratify the convention, although she has consistently acted in accord with its principles. The United States has generally set the example of proper recognition of both belligerency and independence, and, because of the doctrine of the two spheres of influence, has not until recently been forced to take embarrassing positions in European quarrels, where her interest might compel her to depart from the impartial position she has occupied.

(1) Neutrality

(2) Contraband

(3) Recognition

(4) Hague conferences

In 1899 and 1907 the United States was an active participant at the Hague conferences. Although it refused "to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state" or relinquishing "its traditional attitude towards purely American questions," it ratified the conventions framed at these conferences for the pacific settlement of international disputes.[1]

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[1] See pp. 559–560

(5) Arbitration

Among these conventions was one which established an arbitral court for the settlement of questions incapable of diplomatic solution. Not only did the United States accept the principle but it was one of the first states to refer a question to the court for decision. But the United States has been willing to go even further. In 1910 President Taft negotiated treaties which made arbitration compulsory for all controversies which were "justiciable by reason of being acceptable of decision by the application of the principles of law or equity." The treaties furthermore provided that when the disputants disagreed as to whether the matter was justiciable the decision of this question should be made by a joint commission of inquiry. This clause the Senate struck out. Beginning in 1913 Secretary Bryan, with the approval of the president, began to renew the existing arbitration treaties as they expired, with this important additional proviso: that all questions of every nature whatsoever, which diplomacy should fail to settle, should be submitted to an international commission, and that the nations should agree not to declare war or begin hostilities during the investigation of this commission. Twenty such treaties were ratified between 1914 and 1916 and ten more were signed. The states assenting to this principle include practically all the American republics, China, Persia, and all the powers of Europe except Germany and her allies.

[The Taft arbitration treaties]

[The Bryan arbitration treaties]

President Wilson willing to abandon policy of isolation

Without doubt the World War did much to hasten the adoption of these treaties as a means of avoiding future calamities. President Wilson, however, has made an additional suggestion for the maintenance of the future peace of the world. Speaking in May, 1916, he was apparently ready to depart from the traditional position of aloofness held by the United States; indeed, circumstances had driven the United States from this position, so President Wilson truly said:

> We are participants, whether we would or not, in the life of the world. The interests of all nations are our own also. We are partners with the rest. What affects mankind is inevitably our affair as well as

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[1] J. B. Cort. (ed.), The Hague Conventions and Declarations of 1899 and 1907.

Necessity for an international agreement

> the affair of the nations of Europe and Asia. . . . Only when the great nations of the world have reached some sort of agreement as to what they hold to be fundamental to their common interest, and as to some feasible method of acting in concert when any nation or group of nations disturb those fundamental things, can we feel that civilization is at last in a way of justifying existence and claiming to be finally established.

He felt sure that the United States would wish "an universal association of the nations to maintain the inviolate security of the highway of the seas for the common and unhindered use of all the nations of the world, and to prevent any war begun either contrary to treaty covenants or without warning, and full submission of the causes to the opinion of the world — a virtual guarantee of territorial integrity and political independence."[1] In other words, as far as it lay in his power the president was ready to commit the United States to the principle that the peace of the world should be maintained through a League of Nations, which should enforce its judgments upon the world. This is not unlike other proposals which have been made for the same purpose; but it is significant that for the first time the executive of the United States should adopt such a proposal, which reverses the traditional foreign policy of the United States.

President Wilson considers the League of Nations necessary for peace

Before the United States entered the war President Wilson had come to the conclusion that a League of Nations was necessary. For, in his address to the Senate, January 22, 1917, he declared:

> Mere agreements may not make peace secure. It will be absolutely necessary that a force be created as a guarantor of the permanency of the settlement, so much greater than the force of any nation now engaged or any alliance hitherto formed or projected, that no nation, no probable combination of nations could face or withstand it. If the peace presently to be made is to endure, it must be a peace made secure by the organized major force of mankind.

In 1918 he was still more explicit, and in his Liberty Loan address at New York, on September 27, he said: "And, as I see it, the constitution of that League of Nations and the clear definition of its objects must be a part, is in a sense the most essential part, of the peace settlement itself."

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[1] E. E. Robinson and V. J. West, The Foreign Policy of Woodrow Wilson, p. 362.

The Covenant of the League of Nations a part of the peace treaty

In accordance with President Wilson's desires the Allies and the United States gave their first attention to the formation of a covenant for the League of Nations. This was an integral part of the treaty which Germany was forced to accept. The treaty was submitted to the United States Senate, July 10, 1919, and debated for four months. Efforts to amend the treaty proved unavailing. The majority of the Senate, which was Republican, adopted reservations which in the opinion of President Wilson nullified the purpose of the treaty. He therefore urged the Democrats to vote against the ratification rather than to accept such reservations. This was done, and the Senate adjourned November 19, 1919.

The Senate refuses to ratify the treaty with reservations

CHAPTER XXII

THE GOVERNMENT OF TERRITORIES

THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

Clauses in the Constitution from which the power to acquire territory might be derived

The Constitution of the United States makes no express provision for the acquisition of territory. This right, however, has been derived at various times from the following sources: (1) the power to admit new states into the Union,[1] (2) the power to make treaties,[2] (3) the power to declare and carry on war,[3] (4) the power, as a sovereign state, to acquire territory by discovery and occupation or by the methods recognized as proper by international usage.[4]

Admission of states composed of territory in possession of United States at the time of the adoption of the Constitution unquestioned

At the time of the adoption of the Constitution the United States possessed vast territory not included within the boundaries of any of the States. This was the Northwest Territory, ceded to the old Confederation with the intention of being ultimately divided into states and admitted into the Union. The Constitution itself, moreover, provides that Congress may admit new states and contains limitations upon the exercise of this power. Therefore it is wholly fair to assume that the framers of the Constitution fully expected that this power would be used, as indeed it was by the admission of Kentucky in 1792, of Tennessee in 1796, and of Ohio in 1803. But these states were composed of territory taken from that already in the possession of the United States or one of the states when the Constitution was adopted. Another and more difficult problem arose over the acquisition of the Louisiana territory. Jefferson evidently had some doubts as to his power and suggested a constitutional amendment to remove them.[1] If the power to admit states alone be relied upon to permit acquisitions it is quite probable that Jefferson's scruples were well founded and that constitutional amendment might be necessary.

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[1] The Constitution of the United States, Article IV, Sect. iii, clause 1.

[2] Ibid. Article II, Sect. ii, clause 2.

[3] Ibid. Article I, Sect. viii, clause 11.

[4] See W. W. Willoughby, The Constitutional Law of the United States, Vol I, p. 325.

Marshall held that United States might acquire territory by conquest or treaty

But the power to acquire territory through war or treaty stands on no such dubious ground. Thus, in dealing with a case arising out of the acquisition of Florida, Marshall held as follows : "The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties ; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[2] This position has been affirmed again and again and finally restated in that most complete reexamination of the subject, the so-called "Insular Cases."

A war can never be assumed to be carried on for the acquisition of territory

In all of these cases, however, the acquisition of territory is regarded simply as a means for carrying on war and conducting foreign relations. Nowhere is it clearly stated that the Constitution authorizes a war for conquest; in fact, the reverse is true, as was emphatically stated in 1850:

> But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.
>
> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring war imply an authority to the president to enlarge the limits of the United States by subjugating the enemy's territory.[3]

Another possible source of power is found in the fact that in international affairs the general government is considered to possess all the powers of other sovereign independent states except those expressly withheld from it by the Constitution. This doctrine has been sanctioned by the court in these words:

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[1] He seems to have drawn a distinction between the power to acquire territory and the power to incorporate it into the Union. Thus, in January, 1803, he wrote to Gallatin : "There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by the amendment of the Constitution." — Quoted by W. W. Willoughby, The Constitutional Law of the United States, Vol. I, p. 330.

[2] *American Insurance Co.* v. *Canter*, 1 Peters, 511, 542.

[3] *Fleming* v. *Page*, 9 How. 603, 614.

> The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective.[1]

Territory may be acquired by the United States as by any sovereign state

According to this doctrine the United States may, like any other independent sovereign state, conduct foreign relations and annex territory. Indeed, in numerous instances this has been done. American citizens, acting upon the authority of the Guano Law of 1856, have acquired, by discovery, places over which the United States exercises jurisdiction. This has been approved by the court in these words:

> By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation. . . . This principle affords ample warrant for the legislation of Congress concerning Guano Islands.[2]

The United States has acquired territory in three ways, by statute, by treaty, and by joint resolution.

Territory acquired by statute

The Guano Islands Act of 1856,[3] just referred to, provides

> Whenever any citizen of the United States shall "discover a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof and occupy the same, such island, rock, or key may, at the discretion of the President of the United States, be considered as appertaining to the United States."

By this means the jurisdiction of the United States has been extended over nearly a hundred places. The constitutionality of this has just been discussed.

Territory acquired by treaty

The usual method, however, of acquiring territory is by treaty. Such treaties, like all other treaties, are negotiated by the president and require the approval of two thirds of the Senate before becoming binding. In addition, in treaties annexing territory, the action of the House in making the appropriation called for is generally necessary.

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[1] *Fong Yue Ting* v *United States*, 149 U.S. 698, 711.

[2] *Jones* v. *United States*, 137 U.S. 202, 212.

[3] Revised Statutes of United States, Sects. 5570–5578. For a discussion of this subject see J B. Moore, A Digest of International Law, Vol I, pp. 556–580

Territory acquired by joint resolution

The third method of territorial acquisition is by joint resolution. This has been employed twice. In the case of Texas, when the annexation treaty failed to obtain the necessary two-thirds vote, a joint resolution was passed, which required but a bare majority of both Houses. The same method was employed in the case of Hawaii, after it became apparent that the treaty would not obtain the necessary majority. If territory may be annexed by the passage of a statute, which requires but a majority vote, there is no reason to question the constitutionality of annexation by a joint resolution instead of a treaty.

THE POWER OF THE UNITED STATES TO GOVERN TERRITORY

Power of the United States to govern territory unquestioned

The power of the United States to govern territory not within the boundaries of any state has never been questioned. This power may be derived from three different sources: from the express power given to Congress to make rules and regulations respecting the territory belonging to the United States,[1] the implied power derived from the right to acquire territory, and "the power implied from the fact that the states admittedly not having the power, and the power having to exist somewhere, it must rest in the federal government."[2] Thus, in 1810, Marshall held concerning the territory of Orleans:

> The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans.[3]

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[1] The Constitution of the United States, Article IV, Sect. iii, clause 2.

[2] W. W. Willoughby, The Constitutional Law of the United States, p. 351.

[3] *Sere* v. *Pitot*, 6 Cranch, 332, 336–337.

In 1828, Marshall, while repeating his previous reasoning, added the following new suggestion:

> Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States.[1]

METHODS OF ACQUIRING TERRITORY

Territory acquired as the result of military operations

Territory acquired as the result of military operations is for the time being entirely subject to the president as commander in chief of the army. The status of such territory depends not so much upon the Constitution of the United States as upon the principles of international law and the rules laid down and observed for the occupation of enemy territory. The president is not limited by the Constitution but by the rules of war. Thus the court said in 1874 and repeated in 1900:

The Constitution does not apply to territory held by military occupation

> . . . The conquering power has a right to displace the preexisting authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. . . .[2]

Military government in acquired territory only temporary

This arbitrary power which may be utilized during military occupation has both advantages and disadvantages. It enables the president and the commanding general on the spot to take at once such steps as may be necessary, unhampered by the need of obtaining the consent of any other body. By the simple promulgation of an order the general can amend old laws or enact new ones. Especially is this power useful in making the changes necessary for the transition from the old state to the new government. The disadvantages are also obvious. The system is autocratic and absolute. Almost any people resent such absolute control, no matter how excellent, and prefer a share in directing their own affairs, even to their own detriment. Even when such control is acquiesced in, it has a bad moral effect and is a poor preparation for self-government, which seems to be the ideal of the American colonial policy.[1] Nevertheless, such military government has been used to great advantage in Porto Rico and the Philippines.

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[1] *American Insurance Co.* v. *Canter*, 1 Peters, 511, 542.

[2] *New Orleans* v. *New York Mail Steamship Co.*, 20 Wall. 387, 394; *Dooley* v. *United States*, 182 U.S. 222, 231.

Military government ceases on the establishment of peace and the territory becomes dependent on Congress

The military government established by the president automatically ceases upon the conclusion of the treaty of peace. The president cannot exercise the war powers in time of peace. The government of the newly acquired territory ceases to depend upon the military power of the president and is dependent upon Congress, although Congress may either through nonaction or express action allow the already established government to continue. Thus, for example, before the treaty the newly acquired territory is foreign territory and goods imported into it from the United States may be taxed according to the discretion of the president and the military commander. After the treaty, goods imported into the territory are not subject to the military duties but must be admitted free until Congress acts.[2] This is true, although Congress through nonaction may compel the president to continue the government he has established as commander in chief; but there is this difference: the president, acting as commander in chief, cannot be questioned by Congress nor may his decrees be altered. When peace is declared he acts not as commander in chief but as general executive, to carry out the Constitution and the acts of Congress. This is clearly seen by examining the action toward the Philippines. The American forces occupied Manila on August 13, 1898, and from that date the president and his commanders constituted the sole governing authority. This power, resting upon the war power of the president, technically came to an end with the ratification of the treaty with Spain, February 6, 1899, but Congress did not act until 1901. In the meantime the president

Congress may vest the government in the president

[Illustrated by the various forms of government in the Philippines]

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[1] See W. F. Willoughby, Territories and Dependencies of the United States, pp. 23–27.

[2] *Dooley* v. *United States*, 182 U.S. 222.

continued what was practically military government in the absence of congressional action. In 1901 Congress voted that "all military, civil, and judicial powers necessary to govern the Philippine Islands shall, until otherwise provided by Congress, be vested in such person or persons as the President of the United States shall direct. . . ." There was no difference in the course pursued by the president, but his authorization was now obtained expressly from an act of Congress. In 1902 an act was passed establishing civil government in the Philippines, and the presidential government whether by commander in chief or general executive was superseded by congressional government.

The government of the territories vested in Congress

Ever since the establishment of the government Congress has exercised its authority to govern the territories. Even before the adoption of the Constitution the Congress of the Confederation passed the famous Northwest Ordinance for the government of the territory north of the Ohio River, which since that time has served as the basis of the subsequent act for the government of newly acquired territory. There has been almost no question of the power of Congress to do this and few questions concerning the actual course pursued by Congress. Congress has full power and may vest it in the hands of a single officer, as was done in the case of the Philippines by allowing the president to establish whatever form of government he thought necessary; or it may give to the people of the territory a voice in their own government, or may establish almost complete self-government under the supervision of the executive and the courts. The extent of the power of Congress in this field was well-stated by Chief Justice Waite in 1879 when he said:

Congress supreme in the territories

> All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. . . . The organic law of a territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme. . . . Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid,

and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments.[1]

From the time of Marshall's decision in 1828 [2] the governments of the territories have been held to be based upon congressional action. Thus, in speaking of the courts established in Florida, where the judges were appointed for four-year terms, he said:

> These courts then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but was conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.[3]

LIMITATIONS ON THE POWER TO GOVERN TERRITORIES

Does the Constitution apply to the territories?

Although it has not been questioned that Congress has power to establish governments for the territories and to legislate for them, the question has been frequently raised as to the limits of this congressional power. The problem has furnished a most interesting and complex chapter in the constitutional history of the United States. Briefly the question may be stated as follows: Do all the provisions of the Constitution apply to the territories? that is, Is Congress bound in legislating for the territories by the same limitations as it is when legislating for the states? Or, to use the picturesque language adopted in 1898, Does "the Constitution follow the flag"? In answering this question it must be remembered that until 1867 the United States had acquired no territory which it might not properly hope to raise to the rank of states. After 1867 Alaska presented a problem which for years was overlooked because of the scanty population. But after the treaty with Spain the Philippine Islands and Porto Rico, with their large populations and civilizations radically different from those of the United States, required a most searching analysis and a restatement of the constitutional authority and limitations of Congress to govern territories.

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[1] *First National Bank of Brunswick* v. *Yankton*, 101 U. S. 129, 133.

[2] *American Insurance Co.* v. *Canter*, 1 Peters, 511, 542.

[3] 1 Peters, 511, 546.

Could Congress prohibit slavery in the territories?

Until well into the nineteenth century these limitations had not been seriously considered, but with the desire for the extension of slave territory the question became acute. Could Congress prohibit slavery in the territories? Congress had done so in the famous Northwest Ordinance of 1787 and in the Missouri Compromise of 1820, but in 1857 Chief Justice Taney evidently held that such action was beyond the power of Congress because it would result in depriving the slave owner of his property without due process of law. His reasoning was based upon the fact that all the clauses of the Constitution limiting the power of Congress apply to the acts of Congress concerning the territories, and is as follows:

In the Dred Scott case Taney held Congress could not prohibit slavery in the territories

The Constitution extends to the territories

> But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The power of the government and the rights and privileges of the citizens are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the federal government enters into possession in the character impressed upon it by those who created it. It enters upon it with the powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.[1]

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[1] *Dred Scott* v. *Sandford*, 19 How. 393, 449, 450.

The Civil War and the Thirteenth Amendment settled the question as far as slavery was concerned and by constitutional amendment reversed the dictum of Taney. But the constitutional question appeared in other forms. Thus, in 1897 the court held that the Seventh Amendment of the Constitution providing for jury trial required that the verdict of the jury should be unanimous, and that the act of Congress could not impart the power to change this constitutional rule as the territorial legislature of Utah had attempted to do.[1]

Problems presented by the acquisition of the Philippines

All these difficulties, however, sank into insignificance before the complexities presented by the acquisition of the Philippines and Porto Rico and Hawaii. The problems first arose in connection with the enforcement of revenue legislation. If all the provisions and limitations of the Constitution applied to these newly acquired territories, it would be impossible to levy duties upon the imports from these islands to the United States, and likewise it would be impossible for the territorial governments to lay duties different from those levied upon imports to the United States and none upon goods exported from the United States to those islands. These questions came before the court in a series of cases popularly known as the "Insular Cases," of which the most important is *Downes* v. *Bidwell*, where was evolved a theory quite different from any before applied by the court. Five justices agreed in holding that, by the treaty of cession from Spain, Porto Rico came under the sovereignty of the United States as far as other nations were concerned, but denied that it became a part of the United States as far as the Constitution was concerned. Four of the five justices who made up the majority held that while the treaty-making power was competent to annex territories, it was not competent to incorporate territories so annexed into the Union. This required some action either explicit or implied. Thus the dominion of the United States consisted of (1) the states, (2) the territories which had been incorporated into the Union and to which all the provisions of the Constitution applied, (3) territories which were not yet incorporated, to which not all the provisions of the Constitution were applicable. The fifth justice, who sided with

The "Insular Cases"

The islands not a part of the United States although under its sovereignty

Dominion of the United States: (1) states, (2) incorporated territories, (3) unincorporated territories

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[1] *Springville City* v. *Thomas*, 166 U.S. 707.

the majority, made no distinction between incorporated and unincorporated territories.

Next, by the following reasoning the court proceeded to divide the Constitution into two parts, the formal and fundamental:

The Constitution as far as applicable extends to the territories

> Every function of government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. . . . Hence it is that wherever a power is given by the Constitution and there is a limitation imposed upon the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. . . . As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every portion of the Constitution which is applicable to the territories is also controlling therein. . . . From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico.

The Constitution contains fundamental principles which are everywhere applicable and regulations not everywhere applicable

> And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. . . . Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.[1]

Thus the court, without specifying what are the fundamental limitations upon the liberty and property of the citizens, holds that these apply to the states, to incorporated territories, and unincorporated territories alike. What they are and whether they are the same for all unincorporated territories the court will decide in each particular case as it comes up. Other parts of the Constitution, which are in the nature of "mere regulations as to the form and manner in which a conceded power may be

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[1] 182 U. S. 244, 289, 291, 293, 294.

Prohibition of slavery a fundamental limitation

Uniformity of duties a regulation

exercised," apply only to states and incorporated territories. To take two illustrations: The Thirteenth Amendment, which prohibits slavery within the United States "or any place subject to their jurisdiction," is a fundamental limitation and applicable to all classes of territory. But the phrase that "all duties, imposts, and excises shall be uniform throughout the United States" is a "mere regulation," limiting the taxing power, and need not be applied to unincorporated territories.

Effect of this decision

This reasoning, although arousing considerable criticism among constitutional lawyers, has proved thus far a satisfactory solution of the difficulties of the problem presented by the policy of expansion and imperialism, which received its popular sanction by the presidential election of 1900.[1] It is an excellent example of the power of the court to interpret the rigid written Constitution of the United States and to adapt it to the changing development of the country. It has enabled Congress to carry out the policy desired by the electorate and to legislate for the particular needs of each territory, and has made it possible to establish governments for peoples not yet ready for the privileges guaranteed to the citizens of the United States.

Neither indictment by a grand jury nor trial by a petit jury fundamental in unincorporated territories

Some further instances of the application of this principle may be given. In the case of Hawaii it has been held that neither indictment by a grand jury nor trial by a petit jury were "fundamental rights" and thus, since the courts held that Hawaii was not an incorporated territory, the usual procedure in Hawaii was legal.[2] But it has been held that Alaska was an incorporated territory and therefore the inhabitants were entitled to trial by jury.[3] In *Binns* v. *the United States*,[4] it was held that although Alaska was an incorporated territory, the Congress of the United States might act as the local legislature for it, and, as such, was not bound by the rule that all taxes should be uniform throughout the United States, and thus could levy a license fee applicable to Alaska alone.

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[1] A well-known American humorist has thus epitomized the result of the decision and election: "The Constitution may not follow the flag but the Supreme Court follows the election returns."

[2] *Hawaii* v. *Mankichi*, 190 U. S. 197.

[3] *Rasmussen* v. *United States*, 197 U. S. 516.

[4] 194 U. S. 486.

TERRITORIAL GOVERNMENTS

Territories classified as fully organized, partially organized, or unorganized

While from a constitutional point of view the territories may be classified as incorporated or unincorporated, from the political point of view they must be classified as fully organized, partially organized, or unorganized. These classifications, however, by no means coincide, for, although Hawaii from the point of view of the Constitution is an unincorporated territory, it possesses a fully organized territorial government, while Alaska before 1912 was an unorganized territory yet in 1898 was held by the court to be an incorporated territory.

The organized territories

[The Northwest Ordinance]

The model for the government of organized territories is to be found in the famous "Ordinance for the Government of the Territory of the United States Northwest of the Ohio River."[1] By this two schemes of government were provided: one to go into effect immediately and the other when certain conditions were fulfilled. The first provided that the powers of government were to be vested in a governor, a secretary, and a court to consist of three judges, all to be appointed by Congress. As soon as there were five thousand free male inhabitants of full age in the district the second form of government was to go into effect. This plan differed from the first chiefly in that it provided for a legislature. A house of representatives was to be elected by the qualified electors, consisting of one representative for every five hundred male inhabitants, until the number reached twenty-five. A freehold of fifty acres was a qualification for the franchise, which was restricted to persons who had been citizens of one of the states and resident in the district, or to those who had been resident in the district for at least two years. This body was to nominate ten persons residing in the district and each in possession of a freehold of five hundred acres, from which number the president should appoint five to act as the upper house. To these two houses and the governor was given all legislative power. The governor, moreover, was given an absolute veto, and power to convene, prorogue, or dissolve the legislature. It was also provided that the houses in joint assembly should choose a delegate to Congress, who should have a seat with the right to debate but not to vote. The governments established for all the territories on the mainland have followed more or less closely this statute. There have been many variations to suit the particular needs of the individual territories, particularly in the days of their early settlement; but in the later legislation Congress has more and more frequently enacted general laws applicable to all territories having the same status.[1]

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[1] F. N. Thorpe, American Charters, Constitutions, and Organic Laws, Vol. II, p. 957.

Although at one time or another all the states outside of the original thirteen, except Vermont, Maine, and Texas, have possessed a territorial form of government, there are now only two fully organized territories, Alaska, which is held by the court to be an incorporated territory, and Hawaii, which is regarded as unincorporated.

Hawaii

The government of Hawaii[2] depends upon the organic act of 1900. By it the Constitution and laws of the United States applicable to the local conditions were extended to Hawaii. As has been seen, these do not include those provisions of the Constitution relative to jury trial. Citizenship, both in the United States and in the Territory of Hawaii, was conferred upon all persons who were citizens of the Republic of Hawaii on August 12, 1898, or who might reside there one year. The organic act differs from the usual type found in other territories in that, instead of providing merely for a governor and secretary, the whole complement of administrative officers is provided for. The governor and secretary are appointed by the president with the consent of the Senate, while the other territorial officers are appointed and removable by the territorial governor with the assent of their territorial senate. The legislature consists of two houses; the upper composed of fifteen members holding office for four years and seven or eight retiring every two years. The house of representatives consists of thirty members elected every second year. Owing to the mixed character of the population great care is taken in the organic act to determine the franchise. A voter must fulfill the following conditions: (1) He must be a male citizen of the United States; (2) must have resided not less than one year in the territory, and not less than three months in the district in which he is registered; (3) must have attained the age of twenty-one; (4) must have properly registered; (5) must be able to speak, read, and write either the English or Hawaiian language. This last provision is of especial importance in view of the large number of Chinese and Japanese in the island. The number of native Hawaiians has during recent years been decreasing, while the immigration of American citizens has not been large. The result is that the political power is becoming more and more concentrated in a minority of Americans and other English-speaking persons.[1]

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[1] W. F. Willoughby, Territories and Dependencies of the United States, p. 53.

[2] Ibid. pp. 60–70.

The powers of the assembly are the same as are usually granted to legislative assemblies, except that a majority not merely of those present but of the membership must be obtained to pass a bill. The governor, moreover, is given not merely the general veto but the right to veto specific items in a bill appropriating money.

Alaska

Alaska is considered a fully incorporated territory, and all the provisions and limitations of the Constitution are applicable to it. In 1912 it was made a fully organized territory. The governor is appointed by the president; the legislature, consisting of an upper house, or senate, of eight members holding office for four years, and the lower house of sixteen holding office for two years, meets biennially. All laws passed by the assembly are not only subject to the veto of the governor but must be submitted to Congress, where, if disapproved, they become null and void. The legislature may not remain in session more than sixty days unless convened for an extraordinary session of not more than fifteen days by the governor, when requested to do so by the president or in time of public danger. All legislative expenses are met from funds appropriated by Congress. Because of the vast area and small population, Alaska,[1] though an organized territory, is of less importance from a governmental point of view than some of the unorganized territories. At the first session of the first legislature a law was passed granting suffrage to women.

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[1] W. F. Willoughby, Territories and Dependencies of the United States, pp. 55–56. The population of Hawaii in 1910 was one hundred and ninety-one thousand, of which twenty-six thousand were Hawaiian and over one hundred and ten thousand Chinese and Japanese who are ineligible to citizenship.

Status of Porto Rico and the Philippines

The status of Porto Rico and the Philippines is peculiar. They are unincorporated territories, like Hawaii, and until 1917, like Alaska, they did not have the normal type of territorial government. Unlike Alaska, however, the peoples of those islands received a measure of self-government. It would be proper to consider them as not fully organized territories until 1917, and even now the president has certain powers in them which are not usually given to him in the regular type of territorial organization.

Porto Rico

Porto Rico was governed until 1900 under the military authority. In May, 1900, Congress passed the organic act which gave to Porto Rico a form of civil government. By this act the citizens of Porto Rico occupied a peculiar position. They were not made citizens of the United States but were considered citizens of Porto Rico under the protection of the United States, and were not held to be aliens under the provisions of the immigration act of 1891.[2] The governor and six executive officers were appointed by the president. These officers not only had administrative duties to perform but together with five other persons, also appointed by the president, constituted the upper house of the legislature. These five persons must be native inhabitants of the island. The lower house consisted of thirty-five members elected biennially. The franchise was given to male citizens of Porto Rico, twenty-one years of age, who had resided in the island for one year and in the district in which they registered for six months. After 1906 no new name was added to the list unless its owner could read or write.[3] Several rather interesting peculiarities are to be observed in this act. First, practically all the administrative officers were appointed by the president instead of by the territorial governor or elected by the legislature; next, these officers formed a majority of the upper house, thus giving to the president the power to check any legislative act. In 1908 there occurred a deadlock because of the refusal of the council to assent to certain acts of the lower house. This resulted in the refusal of the lower house to pass the budget, and when this condition was referred to Congress a law was passed providing that in future, should the lower house refuse to pass the budget, the taxes and appropriations of the preceding year should be continued.

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[1] In 1917 the population was estimated at 64,873.

[2] *Gonzales* v. *Williams*, 192 U. S. 1.

[3] W. F. Willoughby, Territories and Dependencies of the United States, pp. 96–97.

By act of 1917 Porto Rico became a fully organised territory

On February 20, 1917, Congress passed an amendment to the organic act by which the residents of Porto Rico were admitted collectively to American citizenship and universal male suffrage was established. It was also provided that the upper house, or senate, should be elected, and the heads of the executive departments should be appointed by the territorial governor instead of by the president. This is practically the form of government given to regularly organized territories, and Porto Rico may now be placed in that category.

The Philippines

[Military government]

[The Philippine commission]

The Philippines have had three forms of government varying from complete military government to a type similar to that provided for Porto Rico, which closely resembles that of continental territories of the United States. At the beginning of the American occupation large numbers of the natives revolted against American rule, and until 1899 the government was entirely in the hands of Admiral Dewey and General Otis. In January, 1899, a civilian commission was appointed to act in conjunction with the military power to investigate conditions and report a scheme for government. In March, 1900, President McKinley appointed W. H. Taft head of a commission to continue the work begun by the military officers in establishing a form of civil government, and in 1901 all the power was transferred from the military government, and W. H. Taft became civil governor of the Philippines. Up to this point the entire government was under the direction of the president, first under his power as commander in chief, then as executive until Congress acted, then as executive under the resolution of Congress conferring upon him the power to act. In 1902

Congress passed an organic act providing that when the Islands were pacified and a census taken, a legislative assembly should be established. In 1907 an assembly was opened by Governor Taft.

[The organic act of 1902]

This form of government consisted of a governor appointed by the president, aided by a commission of five Americans and four Filipinos, also appointed by the president. This commission composed the upper house of the legislature. The house of representatives was elected according to a restricted franchise by the voters of those islands not inhabited by Moros or other non-Christian tribes.

By act of 1916 the Philippines became a fully organized territory

On August 29, 1916, President Wilson approved an organic act which made the Philippines virtually an organized territory. The governor-general is appointed by the president, has the usual appointing power, submits the budget, and has the veto not merely of general bills but of special items in appropriation bills. In addition, all the executive functions of the government are directly under his supervision or the supervision of one of the departments over which he has control. The legislature consists of two houses, partly elected and partly appointed. The senate has twenty-four members elected for six years from eleven districts and two members appointed by the governor from the non-Christian districts. In the lower house there are eighty-one members elected for three years and nine appointed by the governor from the non-Christian districts. The legislature has the usual powers, subject to the qualified veto of the governor, but may not pass a measure over his veto without the approval of the president of the United States.

Unorganized districts

The Samoan Islands and Guam

Panama Canal Zone

The unorganized districts include the District of Columbia, the island of Guam, the Panama Canal Zone, the Samoan Islands, and the newly acquired Virgin Islands. They have this common feature, they are governed directly by federal officers without the intervention of a legislative assembly. The Samoan Islands and Guam are governed by the naval officers stationed there and are entirely dependent upon their orders, subject of course to the instructions and directions received from the Navy Department. The Panama Canal Zone is controlled by a governor, appointed by the president for four years, and such other persons as the president deems necessary to administer the government, appointed

Virgin Islands

to serve during his pleasure. In the Virgin Islands the military, civil, and judicial power is vested in a governor and such other persons as the president may appoint, and is to be exercised according to the directions of the president.

The District of Columbia

The District of Columbia, the seat of the federal government, has an area of about seventy square miles and contains a population of 331,069.[1] After several experiments in forms of municipal government, Congress disfranchised the inhabitants and assumed complete control. The executive affairs are managed by a commission of two civilians and one army engineer. Not merely does this commission exercise the executive power but it has large ordinance power. The legislative affairs of the District are conducted by Congress, which sets aside certain days for the consideration of District affairs.

Cuba

Cuba is not a part of the territory of the United States but a semi-independent state, under the protection of the United States. By treaty the United States has the right to intervene when necessary to protect life and property or to establish order.

Results of the policy of territorial government

From an examination of the various forms of territorial government it is clear that while the United States has always had the ideal of self-government, it has not hesitated to establish the strictest sort of autocratic control over the territories. Even then, as in the case of Samoa, the aim is to give to the natives as large a share in the direction of their own affairs as possible. When the small area of the thirteen original states is contrasted with the present territory under the control of the United States it will be recognized at once that the United States has been one of the most successful nations in colonizing and controlling dependencies. However, only since 1898 has the problem of governing large masses of alien populations with different ideas and civilizations presented itself. Whether the United States will be equally successful in solving this problem it is too early to judge. But in dealing with its insular dependencies it is to be noted that it has attempted to apply as rapidly as possible the same principles which have been successful in dealing with its continental possessions.

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[1] Federal Census of 1910.

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA [1787]

[SUBMITTED SEPTEMBER 17, 1787; IN FORCE APRIL 30, 1789]

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. [1.] The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

[2.] No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, ⟨which shall be determined by adding to the whole number of free persons,⟩ [1] including those bound to service for a term of years, and excluding Indians not taxed, ⟨three fifths of all other persons⟩.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; ⟨and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one,

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[1] Modified by Fourteenth Amendment.

[2] Superseded by Fourteenth Amendment.

Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three〉.[1]

[4.] When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. [1.] The Senate of the United States shall be composed of two Senators from each State, 〈chosen by the legislature thereof, for six years; and each Senator shall have one vote〉.[2]

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

[5.] The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

[6.] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4. [1.] The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

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[1] Temporary clause.

[2] Superseded by Seventeenth Amendment.

[2.] The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. [1.] Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.

[2.] Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

[3.] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

[4.] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. [1.] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[2.] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. [1.] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. The Congress shall have power

[1.] To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the Supreme Court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the

United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. [1.] ⟨The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.⟩[1]

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.[2]

[4.] No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any State.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

[7.] No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.[3]

SECTION 10. [1.] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

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[1] Temporary provision.

[2] Extended by the first eight amendments.

[3] Extended by Ninth and Tenth Amendments

[2.] No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

[3.] No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.[1]

ARTICLE II

SECTION 1. [1.] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

[2.] Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

⟨The electors shall meet in their respective States, and vote by ballot for two persons of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.⟩[2]

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[1] Extended by Thirteenth, Fourteenth, and Fifteenth Amendments.

[2] Superseded by Twelfth Amendment.

[3.] The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[4.] No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[5.] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

[6.] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[7.] Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2. [1.] The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[3.] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers, and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; ⟨between a State and citizens of another State;⟩ [1] — between citizens of different States; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

[2.] In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

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[1] Limited by Eleventh Amendment.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2. [1.] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.[1]

[2.] A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

[3.] ⟨No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.⟩ [2]

SECTION 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided ⟨that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and⟩ [3] that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

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[1] Extended by Fourteenth Amendment.

[2] Superseded by Thirteenth Amendment so far as it relates to slaves.

[3] Temporary provision.

ARTICLE VI

[1.] ⟨All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.⟩[1]

[2.] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

[Note of the draftsman as to interlineations in the text of the manuscript.]

Attest.

WILLIAM JACKSON,
Secretary

Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth. **In witness** whereof we have hereunto subscribed our names.

G^{o} WASHINGTON
Presid^{t} and deputy from Virginia

[Signatures of members of the Convention.][2]

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[1] Extended by Fourteenth Amendment, Section 4.

[2] These signatures have no other legal force than that of attestation.

[AMENDMENTS]

ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION[1]

[ARTICLE I][2]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[ARTICLE II]

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

[ARTICLE III]

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V]

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] This heading appears only in the joint resolution submitting the first ten amendments.

[2] In the original manuscripts the first twelve amendments have no numbers.

[ARTICLE VI]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

[ARTICLE VII]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

[ARTICLE VIII]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX]

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

[ARTICLE X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.[1]

[ARTICLE XI][2]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[ARTICLE XII][3]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate; — the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; — the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

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[1] The first ten amendments appear to have been in force from November 3, 1791.

[2] Proclaimed to be in force January 8, 1798.

[3] Proclaimed to be in force September 25, 1804.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] Proclaimed to be in force December 18, 1865. Bears the unnecessary approval of the President.

[2] Proclaimed to be in force July 28, 1868.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

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[1] Proclaimed to be in force March 30, 1870.

ARTICLE XVI[1]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII[2]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies:

Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII[3]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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[1] Passed July, 1909; proclaimed February 25, 1913.

[2] Passed May, 1912, in lieu of Article I, Section iii, clause 1, of the Constitution and so much of clause 2 of the same Section as relates to the filling of vacancies; proclaimed May 31, 1913.

[3] Passed December 3, 1917; proclaimed January 29, 1919.

ARTICLE XIX[4]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. The Congress shall have power by appropriate legislation to enforce the provisions of this article.

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[4] Submitted by Congress, June, 1919; proclaimed August 26, 1920

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